Office Supreme Court, U.
FILED
DEC 30 1914
JAMES D. MAHER
CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1914.

No. 710.

SEABOARD AIR LINE RAILWAY, *Plaintiff in Error,*

vs.

CLARA V. PADGETT, *Defendant in Error.*

ON WRIT OF ERROR TO THE SUPREME COURT OF SOUTH CAROLINA.

MOTION TO DISMISS OR AFFIRM AND BRIEF.

W. BOYD EVANS,
Attorney for Defendant in Error.
JAMES H. FANNING,
MELTON & STURKIE,
THURMOND, TIMMERMAN & CALLISON,
W. H. SHARPE,
A. D. MARTIN,
Of Counsel.

The R. L. Bryan Company, Columbia, S. C.

INDEX.

	PAGE
Motion to Dismiss, Afirm or Transfer to Summary Docket	1
Notice	2
Statement	3
Findings of Fact by State Supreme Court	6
Argument	8
No Federal Question Involved	9
This Court without Jurisdiction	18
When can an employee be said to be employed in Interstate Commerce, within the term of the Act	20

INDEX TO CITATIONS.

Appleby v. Buffalo, 221 U. S., 524	17
Adams v. Church, 193 U. S., 48 Law Ed., 770	19
Bank of Old Dominion v. McVeigh, 98 U. S., 332	9
Chicago & Alton R. Co. v. Perry Co., 119 U. S., 615	9
Clipper Mining Co. v. Eli Min. & L. Co., 194 U. S., 48 Law Ed., 948	20
City of San Francisco v. Scott, 111 U. S., 768	9
Dower v. Richards, 151 U. S., 658, 38 Law Ed., 305	18
Egan v. Hart, 165 U. S., 188, 41 Law Ed., 680	19
Gaar, Scott Co. v. Shannon, — U. S., —	17
Gillis v. Stinchfield, 159 U. S., 658	17
Harding v. Illinois, 196 U. S., 78	18
Horton v. Oregon-Washington R. & Nav. Co., 72 Washington, 503, 130 Pacific, 897	21
Hendrick v. Atchison, T. & S. F. R. Co., 167 U. S., 673, 42 Law Ed., 320	20
Israel v. Authur, 152 U. S., 355, 38 Law Ed., 474	20
Johnson v. Southern P. Co., 196 U. S., 1, 49 Law Ed., 363	21

PAGE

Lamphere v. Oregon R. & Nav. Co., L. R. A. (N. S.), 116, C. C. A. 156 Fed., 336 21
L. & N. R. R. Co. v. Smith, 204 U. S., 551 11
Maxwell v. Newbold, 18 How., 515 17
Minneapolis & St. L. R. Co. v. Minnesota Railroad & W. Com., 193 U. S., 48 Law Ed., 619 19
New York Life Insurance Co. v. Hendren, 92 U. S., 286 9
Noble v. Mitchell, 164 U. S., 367, 41 Law Ed., 472 ... 20
Pederson v. Delaware, L. & W. R. Co., 229 U. S., 57 Law Ed., 1128 20
Republican River Bridge Co. v. Kansas, P. R. Co., 92 U. S., 315, 23 Law Ed., 515 20
Rockhold v. Rockhold, 92 U. S., 129 9
Sayward v. Deny, 158 U. S., 180 11
Seaboard Air Line Railway v. Duvall, 225 U. S., 477, 56 Law Ed., 1171 10
St. L. etc. Ry. Co. v. Taylor, 210 U. S., 281 16
Speed v. McCarthy, 181 U. S., 299 17
Turner v. New York, 168 U. S., 90, 42 Law Ed., 392 .. 20
Waters-Pierce Oil Co. v. Texas, 212 U. S., 86 18

IN THE

Supreme Court of the United States

OCTOBER TERM, 1914.

No. 710.

SEABOARD AIR LINE RAILWAY, *Plaintiff in Error,*

vs.

CLARA V. PADGETT, *Defendant in Error.*

ON WRIT OF ERROR TO THE SUPREME COURT OF SOUTH CAROLINA.

MOTION TO DISMISS OR AFFIRM

Now comes the defendant in error, Clara V. Padgett, administratrix, by her counsel, W. Boyd Evans, appearing in her behalf, and moves the Court to dismiss the writ of error in the above entitled cause, for want of jurisdiction and upon the grounds set forth in the brief filed herewith.

The defendant in error further moves the Court to affirm the judgment rendered by the Supreme Court of the State of South Carolina upon the ground that it is mainfest that the writ of error was taken for delay only, and that the questions from which the decision of the cause depends are so frivolous, as not to need further argument.

The defendant in error further moves the Court in the event that it should desire to hear argument on the questions involved that this cause be transferred to the summary docket, and there be proceeded with on the ground that the cause is of such a character as not to justify extended argument.

The grounds of this motion, the statement of the case and the arguments thereon, are more fully set forth in the accompanying brief, all of which is respectfully herewith submitted.

W. BOYD EVANS,
Attorney for Defendant in Error.

Lyles & Lyles, Attorneys for the Seaboard Air Line Railway, Plaintiff in Error.

Dear Sirs: Please take notice that on Monday, the 4th day of January, A. D. 1915, at the opening of the Court, or as soon thereafter as counsel can be heard, the motion, of which the foregoing is a copy, will be submitted to the Supreme Court of the United States, for its decision.

Attached hereto, please find copy of the motion to dismiss or affirm, the brief and argument to be submitted in support thereof, and also the motion to transfer this cause to the summary docket, if the Court should desire to hear argument thereon.

W. BOYD EVANS,
Attorney for Defendant in Error.

The foregoing notice is hereby accepted and delivery of a copy thereof, together with the above mentioned motion and brief therein mentioned, are hereby acknowledged this 9th day of December, A. D. 1914.

. . . . . .

IN THE SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1914.

No. 710.

SEABOARD AIR LINE RAILWAY, *Plaintiff in Error,*

vs.

CLARA V. PADGETT, *Defendant in Error.*

STATEMENT OF DEFENDANT IN ERROR.

This suit was commenced in the Court of Common Pleas of Lexington county, South Carolina, under the Federal Employers' Liability Act, by Clara V. Padgett, as administratrix of the estate of her husband, Lewis H. Padgett. In this action damages were sought for injuries resulting in the death of the said Lewis H. Padgett, while in the line of his duty as a locomotive engineer.

Upon the trial of the case, and at the conclusion of all of the testimony, the defendant moved for the direction of a verdict in its favor, upon the ground that the entire testimony did not admit of the inference that plaintiff's intestate was employed in interstate commerce at the time of his injury, and upon the ground that the entire evidence did not admit of the inference that the defendant had been guilty of negligence in the particulars alleged in the complaint, and upon the further ground that the only inference to be drawn from the testimony was that the plaintiff assumed the risks of the dangers and defects causing his death. This motion was overruled by the Circuit Court, and the cause submitted to the jury who returned a verdict in favor of the plaintiff for twenty thousand ($20,000) dollars. Thereupon the defendant duly made a motion for a new trial, upon the

minutes. This was refused. From the judgment entered upon said verdict an appeal was taken to the Supreme Court of the State by the defendant below, who is appellant herein, which Court affirmed the decision of the lower Court. The present writ of error is prosecuted by the defendant below for the purpose of bringing that decision to this Court.

Briefly stated the facts are: That Lewis H. Padgett lived in the city of Savannah, State of Georgia, and had a regular run as passenger engineer between the city of Savannah, Ga., and the city of Columbia, S. C., and that on the 11th day of January, 1913, he left Savannah, Georgia, for the city of Columbia, S. C., about four o'clock in the afternoon, on his regular run, and was to leave Columbia the next morning, January 12th, 1913, about six o'clock, on his regular run back to the city of Savannah, Georgia. That on the night of the 11th January, 1913, when Mr. Padgett reached the station of Cayce, South Carolina, where the Seaboard Air Line Railway was building a roundhouse and terminal, which is located about two miles from the city of Columbia, S. C., Padgett was informed by one of the agents of the said company that when he arrived at Columbia, S. C., to return to the station of Cayce, where the said roundhouse was located, and bring his engine with him, that the company wanted to hold him to take out a special train, which was to leave Columbia about twelve o'clock that night should another engineer in its service not get into Columbia in time to take this train out. Mr. Padgett returned to the roundhouse at Cayce, with his engine, and went into the roundhouse and registered off, and placed a repair slip on a hook by the register, to the effect that the boxes on his engine had run hot and that he wanted them repaired during the night. Later that night he was informed that the other engineer had come in to take out this special trian and that he would take his regular run

back to Savannah the next morning at six o'clock. Mr. Padgett then went to the boarding house at Cayce to retire for the night, but found that it was too late for him to get a room. He then returned to the roundhouse and slept on one of the engines, No. 66, which was in the roundhouse until the next morning about 4:30 o'clock, when the hostler went into the roundhouse for the purpose of taking out the engines to water and coal them before leaving. Mr. Padgett was found by the hostler, Ernest Horsford, on engine No. 66 about 4:30 o'clock on the morning of January 12th, 1913, and Mr. Padgett rode out to the coal chute on engine No. 66 with the hostler, a distance of about seventy-five yards, and asked the hostler where his engine was, as he wanted to see if it had been repaired during the night, before leaving for Savannah in a very short time. The hostler informed Mr. Padgett that his engine was in the roundhouse on track No. 3, whereupon Mr. Padgett left in the direction of the roundhouse and was never seen any more until found in this drop pit, located in the roundhouse, over which his engine was standing. At the time Mr. Padgett left the hostler to go to the roundhouse he had on his overalls and cap, prepared to go out on his run. The call boy that calls the engineers and firemen to go out on their regular runs was then looking for Mr. Padgett to call him in time to take his regular run. The roundhouse at the station of Cayce had not been completed; no lights had been installed in it, and this drop pit, which was more than eight feet deep, had not been covered, and the company had only begun to allow its employees to use the roundhouse on Sunday, January 5th, 1913, just one week before Mr. Padgett was killed, and this was the third trip that Mr. Padgett had made from Savannah since the roundhouse had been in use. The accommodations for the engineers and firemen at this new terminal were very poor, and

it had been customary for the engineers and firemen during the time that they had been running into Cayce, when they could not get accommodations otherwise, to sleep in the houndhouse on the engine.

Findings of Fact by the Supreme Court of South Carolina.

The Supreme Court of South Carolina in examining the record presented to that Court, from the trial Court, found that:

> "There was evidence to show that when the engine came into the yard that night it had a hot box and needed repair. That the rule required the engineer to inspect his engine only about a half hour before the leaving time. There was no intimation that he was forbidden to inspect it before. There was evidence that if the inspection was made at the required hour and it was found that the repairs had not been made or properly made, then the engine would have to be returned to the roundhouse to have the repairs properly made. That the repairs would take time and the time necessary would have to be taken even if it delayed the departure of his train. The evidence is circumstantial, but conclusions may be drawn from circumstances. On the trial appellant took the position that the purpose must be inferred from the circumstances.
>
> "The plaintiff offered to prove Mr. Padgett's declarations, but on appellant's motion, the statements were ruled out because his Honor said the purpose must be inferred from circumstances. In this ruling the appellant acquiesced, and of it there is no complaint. So the question is, are there circumstances from which his purpose can be inferred? It is not altogether fair to try a case on one theory and dismiss it on another.

Mr. Padgett had recently been promoted to a passenger run. Repairs had to be made. He was already awake and dressed a few minutes before he was to be called. He was on the yard with his personal preparations made. He asked where his engine was placed and was told by the hostler in charge that it was on track No. 3 in the roundhouse, and started in that direction. Of course, he had the right, under the rules, to loaf around until the exact minute that the rule required him to take his engine, and if error had occurred in the mechanical department, he had the right to send the engine back and delay the train and say to his superiors, the rule does not require any more and I am not going to do any more than the strict rule requires. Would a faithful servant be likely to do that? That was a question for the jury. Would a man recently promoted stand upon the strict letter of the rule? That was a question for the jury. There is a suggestion that Mr. Padgett went to his engine to sleep. The time at his disposal was short. He did not leave in the office a note as to where he could be found. He went to sleep on an engine that left earlier than he was required to be called. He was found and waked early. The saying, 'the engines belong to the company, but the runs belong to the men,' is much relied upon to show that engines might be changed. The statement, however, is made that while a change could be made, yet the general practice was to allow the use of the same engine. The jury was told of the time that would elapse between the time Mr. Padgett was waked and the time of his regular call. Was it probable that he could use that time in sleep or in inspecting the engine to see that there was no unnecessary delay in doing his work? These were questions for the jury.

> "If they inferred from the circumstances that Mr. Padgett was doing the work that was required of him, not at the time it was required, but at a time when it was not forbidden, then they could conclude that he was engaged in interstate commerce, and under the protection of the Federal statute his Honor could not have directed a verdict on the ground that there was no evidence from which it could be inferred that Mr. Padgett was engaged at the time of his death in interstate commerce."

We submit these findings of fact by the Supreme Court of South Carolina will not be reviewed by this Court.

ARGUMENT.

It becomes manifest from an examination of the assignment of error, in connection with the charge delivered to the jury, that the purpose of this appeal is for delay only.

Nine errors are assigned by the plaintiff in error, who was the defendant below. They are all directed to the affirmance by the State Supreme Court of the judgment of the trial Court, as constituting a denial of a right, privilege and immunity under the Federal Employers' Liability Act.

Upon the presentation of the case to the jury the plaintiff below offered 15 prayers, while the defendant below offered 17, going into the greatest detail on the question of what constituted negligence under this law, the burden of proof and the rights of the defendant, as well as on the question of damages. All of the prayers so offered below were given by the trial Court.

No exceptions were noted at the time of the delivery of the charge, and, as will hereafter appear, the objections thereto were raised for the first time on appeal.

No Federal Question Involved.

There are nine errors assigned on this appeal, none of them clearly raise any Federal question under the Federal Employers' Liability Act. We submit, therefore, that the question involved does not constitute a denial of a right, privilege or immunity under the Constitution. If this raises a Federal question, then every adverse ruling on the introduction of evidence would support the right of appeal to this Court from the highest Court of the State, which we submit is not the law. If this constitutes a reviewable error in this Court, then substantially every question passed upon by the State Court during the cause of a trial under the Act in question would be reviewable here. Every rule and principal governing the law of master and servant decided adversely to the defendant would be the subject of review by this Court, and the hearing by the intermediate State Court would be but an idle ceremony. We submit this is not, and cannot be, the law.

The ninth error assigned clearly rests upon principles of general law. This being true, it does not raise the Federal question, nor is it such a question as is subject to review by this Court on writ of error. It is not sufficient that the case was brought under the Federal statute, but it is the determination of the Federal question that confers jurisdiction. We submit that there was no such question raised.

City of San Francisco v. Scott, 111 U. S., 768, 769.
Chicago and Alton R. Co. v. Ferry Co., 119 U. S., 615, 624.
Bank of the Old Dominion v. McVeigh, 98 U. S., 332.
Rockhold v. Rockhold, 92 U. S., 129.
New York Life Ins. Co. v. Hendren, 92 U. S., 286.

This Court has held that: "The rule in relation to our jurisdiction is, that it must either appear from the record

in express terms that there has been a decision against the right claimed under the Constitution, laws or treaties of the United States, or that the judgment or decree complained of could not have been given without so deciding." (Dugger v. Bocock, 104 U. S., 596, 604.) Outside of the simple fact that the suit was brought under the Federal Employers' Liability Act, there is nothing in the record which in express terms shows there has been a decision against any Federal right.

One of the latest decisions of this Court sustaining this view of the case of the Seaboard Air Line Railway v. Duvall, reported in 225 U. S., 477; 56 Law Ed., 1171; and for the convenience of this Court is here quoted in full.

"Seaboard Air Line Railway, *Plaintiff in Error,*

vs.

Ernest N. Duvall.

In error to the Supreme Court of the State of North Carolina.

[June 10, 1912.]

Mr. Justice Lurton delivered the opinion of the Court:

"This was an action by an employee of the plaintiff in error to recover damages for severe and permanent personal injuries alleged to have been received while in its service. The plaintiff alleged that he was baggage-master and flagman on one of the defendant's passenger trains, running from Portsmouth, Virginia, to Monroe, North Carolina. That a head-on collision occurred with another of defendant's train, whereby plaintiff and others were injured, and that the collision was due to the negligence of defendant's officers and agents. The answer was, in substance, a general denial for want of knowledge. There was a jury, verdict and judgment for the defendant in error, which was later

affirmed by the Supreme Court of the State. This writ of error was allowed by the Chief Justice of that Court upon the ground that 'there was drawn into question a right, privilege or immunity claimed by the railroad company under a statute of the United States, and the decision was against such right, privilege or immunity so claimed and specially set up by said defendant,' etc. Such a certificate is, however, not sufficient to confer jurisdiction to review the judgment of a State Court under Section 709, Revised Statutes. That there was set up and denied some claim or right under the Constitution or a statute of the United States must appear upon the record, and such a certificate is only of value to make more definite or certain that the Federal right was definitely asserted and decided. Sayward v. Denny, 158 U. S., 180, 183; L. & N. R. Co. v. Smith, 204 U. S., 551.

The Federal question relied upon to sustain the writ of error to this Court concerns the construction and application of the Employers' Liability Act of April 22, 1908, 35 Stat. at Large, 65. Neither the complaint nor the answer makes any direct reference to that Act; but the complaint did allege that the railroad company was operating a line of railroad between Portsmouth, Virginia, and Monroe, North Carolina, and that the plaintiff while in its employment as baggage-master and flagman upon a passenger train running between said points was negligently injured by a head-on collision. This states a ground of action under that Act and it was so assumed by the trial Court, as appears from that part of the charge relating to the effect of contributory negligence, as well as from some of the questions made in the Supreme Court of the State.

That the collision was due to negligence was conceded. The only defense which seems to have been made was that under the rules of the company, the plaintiff was required

to remain in the baggage car; but that he was hurt while in the express car, a place where, it is claimed, his duty did not call him, and, therefore, he was not injured while employed in the service of the company, or engaged in any duty his employment devolved upon him.

The case was submitted upon these issues, and finding of the jury upon each was as follows:

'1. Was the plaintiff injured by the negligence of the defendant? Answer. Yes.

'2. Was the plaintiff's injury caused by his contributory negligence? Answer. No.

'3. What damage is the plaintiff entitled to recover? Answer. $30,000.'

Four requests for special charges, which bear upon this defense and which were denied, have been assigned here as error reviewable by this Court. They were as follows:

'1. That where an employee undertakes to do something not his duty to do, the master is not negligent; and if the jury shall find by the greater weight of the evidence that the plaintiff was acting outside of the scope of his employment when he was injured, they will find the first issue "No."

'3. That as the plaintiff admits that he was in the express car at the time of his injuries, and as the rules of the receivers of the defendant (of which he admits he had that notice) required him to remain in the baggage car, when not engaged in flagging the train, the burden is upon the plaintiff to satisfy the jury by the greater weight of evidence, that when he went into said express car, and was injured, he was engaged in the discharge of the duties of his employment, and if he has failed to so satisfy the jury, you will answer the first issue "No."

'4. That unless the jury shall find by the greater weight of the evidence that when the plaintiff went into the express

car, he understood that he was going there to discharge some of the duties of his employment, the defendant's negligence in causing the derailment of said car would not be the proximate cause of the plaintiff's injuries, and the jury will answer the first issue "No."

'6. The admitted rules of the receivers of the defendant required the plaintiff to remain in the baggage car when not engaged in flagging the train, and the plaintiff had no right to go into the express car in violation of the provisions of the said rules, unless the conductor ordered him to do so for the purpose of discharging some one of the duties of his employment; and unless the jury shall find by the greater weight of the evidence that when the conductor told the plaintiff to go with him into said car, he thereby understood that the conductor wished him to go to discharge his duties as an employee of the defendant, the jury will answer the first issue "No." '

The plaintiff in error also excepted to a part of the Court's charge which was in these words:

'If you find from the evidence that the plaintiff had no right to go into the express car; that he was not where he should have been; and you further find that he would not have been injured but for his going into the express car, *and that his going into the express car was such an act on his part that a reasonably prudent man ordinarily would not have done under the circumstances of the situation*, then he would be guilty of contributory negligence, and it would be your duty to answer the second issue "Yes." If you do not so find, it would be your duty to answer the second issue "No." '

Not one of the requests asks any definite construction of any part of the Employers' Liability Act, or, indeed, contains any reference whatever to the Act

They are based alone upon the admitted facts that at the time of the collision the plaintiff was in the express car, and that there was a rule of the company requiring him to be in the baggage car. They assume that in being in the express car he was where he had no right to be, and that if injured while there the jury must acquit the company of negligence and upon that issue find for the railroad company. The requests take no account of the legal effect of other evidence in the case. Thus, there was evidence tending to show that the express car was used for through baggage, and that baggage was often received from the platform into the express car, and carried to the adjacent baggage car. There was also evidence tending to show that the rule referred to was not enforced, and that the baggage-master and express messenger frequently exchanged work, and that this was known to the conductor, who made no objection. There was also evidence tending to show that both the conductor and the plaintiff had gone to the express car, either upon the call of the messenger or for a social purpose, the plaintiff in either event going by direction or on invitation of his immediate superior, the conductor of the train. Any question as to whether his being in the express car at the moment of the collision either contributed to the collision or to the injury he sustained, as well as any consideration of the question whether he was in any way negligent in being there, as being in a place of greater danger than if in the baggage car, was ignored.

The trial Court was under no obligation to give special charges based upon but a part of the evidence—charges which, in effect, took from the jury every question save the single fact that plaintiff was, when hurt, in the express car, and that there was a rule which required him to remain in the baggage car.

But the plaintiff in error now urges that it was entitled to have construed that provision of the Employers' Liability Act which requires that a plaintiff to recover under it must have been injured 'while he was employed by such carrier in such commerce,' and that the requests denied were applicable to the evidence which tended to show that he had ceased to be such an employee, because he was not, at the moment of the injury, engaged in the conduct of interstate commerce, or at the place where his duty required him to be. That the plaintiff was in the general employment of an interstate railroad, and at the time was the baggage-master of one of its trains running from one State to another, was shown by all the evidence. If his employment had been terminated, it was solely because he had momentarily gone into the adjacent express car. If he was injured while employed about something which it was not his duty to do, it was solely due to the fact that he had gone into that car either under direction or with the consent of his conductor.

This case does not come here from a Federal Court and we are, therefore, not a Court of general review. It comes under Section 709, Rev. Stat., and the power to review a judgment of a State Court is limited and defined by that provision. The sole ground upon which our jurisdiction is invoked is found in the third clause of the section, which provides that, 'when any title, right, privilege or immunity is claimed under the Constitution, or any treaty or statute * * * and the decision is against the title, right, privilege or immunity specially set up or claimed, * * * may be re-examined or reviewed.' * * *

This action was brought under an Act of Congress. If the Act has been erroneously construed and exceptions saved, or if a particular construction to which the party asking was entitled, was denied, a right has been denied

under the statute, and the question may be reviewed by this Court. In St. L. etc. Ry. v. Taylor, 210 U. S., 281, 293, it was said:

> 'Where a party to litigation in a State Court insists, by way of objection to or requests for instructions, upon a construction of a statute of the United States, which will lead, or, on possible findings of fact from the evidence may lead, to a judgment in his favor, and his claim in this respect, being duly set up, is denied by the highest Court of the State, then the question thus raised may be reviewed in this Court. The plain reason is that in all such cases he has claimed in the State Court a right or immunity under a law of the United States, and it has been denied to him. Jurisdiction so clearly warranted by the Constitution and so explicitly conferred by the Act of Congress needs no justification. But it may not be out of place to say that in no other manner can a uniform construction of the statute laws of the United States be secured, so that they shall have the same meaning and effect in all the States of the Union.'

That case came from a State Court from a judgment against the plaintiff in error in an action under the Safety Appliance Act. But in that case the Federal question was specially set up and definite rulings had upon definite questions requiring a construction of the Act. Thus the Court concludes the paragraph above set out by saying:

> 'The defendant, now plaintiff in error, objected to an erroneous construction of the Safety Appliance Act, which warranted on the evidence a judgment against it, and insisted upon a correct construction of the Act, which warranted on the evidence a judgment in its

> favor. The denials of its claims were decisions of Federal questions reviewable here.'

It was the obvious duty of counsel, if they wished any particular construction of the Act, to put the request in such definite terms as that the attention of the Court might be directed to the point, and the record here should show that the right now claimed was the right 'specially set up' and denied by the Court. 'It must appear on the face of the record that it was in fact raised; that the judicial mind of the Court was exercised upon it; and then a decision against the right claimed under it.' Or, at all events, it must appear from the record that there was necessarily present a definite issue as to the correct construction of the Act, so directly involved that the Court could not have given the judgment it did without deciding the question against the contention of the plaintiff in error. Maxwell v. Newbold, 18 How., 515; Sayward v. Denny, 158 U. S., 180; Gillis v. Stinchfield, 159 U. S., 658; Speed v. McCarthy, 181 U. S., 299, 275, 276; Gaar, Scott Co. v. Shannon, decided at present term. In Appleby v. Buffalo, 221 U. S., 524, 529, this Court said:

> 'This Court has had frequent occasion to say that its right to review the judgment of the highest Court of a State is specifically limited by the provisions of Section 709 of the Revised Statutes of the United States. This right of review in cases such as the one at bar depends upon an alleged denial of some right, privilege or immunity specially set up and claimed under the Constitution, or authority of the United States, which it is alleged has been denied by the judgment of the State Court. In such cases it is thoroughly well settled that the record of the State Court must disclose that the right so set up and claimed was expressly

> denied, or that such was the necessary effect, in law, of the judgment. Sayward v. Denny, 158 U. S., 180, 183; Harding v. Illinois, 196 U. S., 78; Waters-Pierce Oil Co. v. Texas, 212 U. S., 86, 97.'

Passing now to the error assigned to a paragraph in the general charge, the part objected to and assigned as error is the clause italicized. It was a part of the general charge in respect of contributory negligence. It was limited to the separate issue submitted to the jury as to such negligence.

It is not easy to see why the mere going into the express car would be negligent unless the conditions were such as to be an act of imprudence which a reasonable man would not have done. But this we pass by as pertaining to the merits. In any event the exception did not raise any specific question as to the proper construction of the Act under which this action had been brought.

The jury was in explicit terms told that if they found the plaintiff guilty of contributory negligence it would not bar a recovery, but that the damages assessed must be diminished in proportion to the amount of negligence attributable to the plaintiff. This was in pursuance of the statute. The jury specially found that the plaintiff had not been guilty of contributory negligence.

In conclusion, we are of opinion that neither the instructions denied nor that objected to are sufficient to raise any Federal question which this Court may review. The motion to dismiss the writ for want of jurisdiction is therefore granted."

This Court Without Jurisdiction.

We submit that this Court is clearly without jurisdiction to review the findings of fact of the two lower Courts.

In Dower v. Richards, 151 U. S., 658, 38 Law. Ed., 305, the Court held:

"To review the decision of the State Court upon the question of fact is not within the jurisdiction of this Court.

A writ of error brings up matter of law only.

Upon a writ of error, this Court cannot review a decision of a question of fact, even where, by the local practice of the State, the law and the facts are tried together by the Judge without a jury.

A writ of error to review a judgment or decree of a State Court can be sustained only when the decision of the State Court is against a right claimed under the Constitution and laws of the United States.

When the question decided by the State Court is not merely of the weight or sufficiency of the evidence to prove a fact, but of the competency and legal effect of the evidence as bearing upon a question of Federal law, the decision may be reviewed by this Court.

This Court, in an action at law, at least, has no jurisdiction to review the decision of the highest Court of a State upon a pure question of fact, although a Federal question would or would not be presented according to the way in which the question of fact was decided."

This Court held in Minneapolis & St. L. R. R. Co. v. Minnesota Railroad & W. Com., 193 U. S., 48 Law Ed. 619:

"The finding, like the verdict of a jury, is conclusive in this Court. Dower v. Richards, 151 U. S. 658, 38 Law Ed. 305, 14 Sup. Ct. Rep. 452."

It also held in Adams v. Church, 193 U. S., 48 Law Ed. 770:

"The finding of facts made in the Supreme Court of Oregon is binding upon this Court and will be the basis of decision here. Egan v. Hart, 165 U. S. 188, 41

L. Ed. 680, 17 Sup. Ct. Rep. 300; Dower v. Richards, 151 U. S. 658, 38 L. Ed. 305, 14 Sup. Ct. Rep. 452."

Also in Clipper Min. Co. v. Eli Min. & L. Co., 194 U. S. 48, Law Ed. 948, the Court said:

> "It is the settled rule that this Court in an action of law, at least, has no jurisdiction to review the conclusions of the highest Court of a State upon questions of fact. Republican River Bridge Co. v. Kansas P. R. Co., 92 U. S. 315, 23 Law Ed. 515; Dower v. Richards, 151 U. S. 658, 38 Law Ed. 305, 14 Sup. Ct. Rep. 452; Israel v. Arthur, 152 U. S. 355, 38 Law Ed. 474, 14 Sup. Ct. Rep. 583; Noble v. Mitchell, 164 U. S. 367, 41 Law Ed. 472, 17 Sup. Ct. Rep., 110; Hedrick v. Atchinson, T. & S. F. R. Co., 167 U. S. 673, 677, 42 Law Ed. 320, 321, 17 Sup. Ct. Rep. 922; Turner v. New York, 168 U. S. 90-95, 42 Law Ed. 392, 394, 18 Sup Ct. Rep. 38; Egan v. Hart, 165 U. S. 188, 41 Law Ed. 680, 17 Sup. Ct. Rep. 300.

When Can an Employee Be Said to Be Employed in Interstate Commerce Within the Term of the Act.

As it was said by Mr. Justice Van Deventer in delivering the opinion of the Court in Pedersen v. Delaware, L. & W. R. Co., 229 U. S., 57 Law Ed. 1128:

> "The point is made that the plaintiff was not, at the time of his injury, engaged in removing the old girder and inserting the new one, but was merely carrying to the place where that work was to be done, some of the materials to be used therein. We think there is no merit in this. It was necessary to the repair of the bridge that the material be at hand, and the act of

taking them there was a part of that work. In other words, it was a minor task which was essentially a part of the larger one, as in the case when an engineer takes his engine from the roundhouse to the track on which are the cars he is to haul in interstate commerce. See Lamphere v. Oregon R. & Nav. Company, L. R. A. (N. S.) 116, C. C. A. 156, 196, Fed. 336; Horton v. Oregon-Washington R. & Nav. Co., 72 Washington 503, 130 Pac. 897; Johnson v. Southern P. Co., 196 U. S. 1, 21, 49 Law Ed. 363, 371, 25 Sup. Ct. Rep. 158."

So it was with Mr. Padgett in going to the roundhouse to see if his engine had been properly repaired before it was taken out of the roundhouse to be coupled to his train to go to Savannah.

In conclusion, it is submitted that the issues have been fairly submitted to the jury upon seventeen prayers offered by the defendant below, touching upon every conceivable proposition of the law of negligence relating to a case of this character, every one of which was given by the Court without qualification, the judgment should be affirmed since no prejudicial error is assigned.

Respectfully submitted,

W. Boyd Evans,
Attorney for Defendant in Error.

James H. Fanning,
Melton & Sturkie,
Thurmond, Timmerman & Callison,
W. H. Sharpe,
A. D. Martin,
Of Counsel.

INDEX.

	PAGE
Statement of Case	1
Argument	2
Rules of Railroad Company	8
Discussion of Rules as to Engineers	8

INDEX TO CITATIONS.

American Railroad Co. v. Didricksen, 227 U. S., 145	15
McGovern, Admx., v. Phila. etc. R. Co., 235 U. S., 389, 402.	15
Meyers v. Pittsburg Coal Co., 233 U. S., 184	14
Missouri etc. R. Co. v. United States, 231 U. S., 112	15
North Carolina R. Co. v. Zachary, Admr., 232 U. S., 248, 260	13
Sanders v. Railway Co., 97 S. C., —	14
St. L. & Iron Mt. R. Co. v. McQuerter, 229 U. S., 265	14

In the Supreme Court of the United States

OCTOBER TERM, 1914.

No. 710

SEABOARD AIR LINE RAILWAY, PLAINTIFF IN ERROR,

vs.

CLARA V. PADGETT, Administratrix of the Estate of Lewis H. Padgett, Deceased, DEFENDANT IN ERROR.

ON WRIT OF ERROR TO THE SUPREME COURT OF SOUTH CAROLINA.

Brief for Defendant in Error on the Merits.

W. BOYD EVANS,
Attorney for Defendant in Error.

STATEMENT FOR DEFENDANT IN ERROR.

STATEMENT OF CASE.

A motion to dismiss or affirm was made before the Court, and was presented on printed briefs in behalf of the motion and against the motion. The Court disposed of the motion by placing the case upon the Summary Docket for a hearing.

The defendant in error relies, for its statement of the case, upon what is presented in its argument in support of its motion to dismiss, above referred to. The argument which it desires

to submit, and have made in addition thereto, presents such additional points of fact not heretofore called to the attention of the Court.

ARGUMENT.

It is undisputed that the intestate, Padgett, was employed in interstate commerce; and, as such, had been for a few days, running an engine, drawing a passenger train, from the city of Savannah, in Georgia, to the city of Columbia, in South Carolina, and between the said city of Columbia and the said city of Savannah.

It is also undisputed that the trains that he had run were numbered, when proceeding from Savannah to Columbia, as No. 62, and returning from Columbia to Savannah, as No. 59. The number of the engine that he had heretofore used, to wit, in the two prior trips, was No. 35.

It does not appear in the testimony that the intestate had personal knowledge of the existence of drop-pits on any particular track in the roundhouse. If such knowledge existed, it is only imputable by inference. It is further to be especially noted that the trains to which he was assigned, Nos. 62 and 59, were, as to their times of arrivals at Savannah and at Cayce, stated in Central time, and not in Eastern time. This time—the difference between Eastern and Central time, being one hour in advance of Central time. It is found, however, that upon the time table in evidence, at page 137 of the record, that the train times are fixed from leaving Cayce and arriving at Cayce, from leaving Savannah and arriving at Savannah was on Central time; but it is to be especially observed that Cayce was a mere local station, near the new machine shops or yards of the Seaboard Air Line Railway; that the engine drawing a train from Savannah had to pass through Cayce, to Columbia, and then to return from Columbia to Cayce—a distince of something over two miles; and the engine drawing the train from Cayce, would have first to go from that point to Columbia, and thence back to Cayce. So, in the operation of trains under consideration, you have to consider the time lost or taken up, or consumed, by the train going to Columbia and returning.

The locomotive driven by the intestate was, however, to haul said train further to Columbia, there to separate from the train and return to Cayce. How much time was taken up in

this movement from Cayce to Columbia and return, is not stated.

It is undisputed that the engine drawing train 62, driven by the intestate, was brought back from Columbia to Cayce, placed at the proper point on one of the side-lines, and the hostler took charge thereof. The intestate thereafter, reported that there was a hot-box which needed repair.

Stopping here for a moment and observing that the defendant in error's intestate was in the employ of the railroad company from the time he was awakened at 4:30 a. m., Central time, or 5:30 Eastern time, and inquired as to the location of his engine, to the time the accident occurred, which resulted in his death, must have been

(*a*) Engaged in interstate commerce, in the employment of a railroad company, engaged in such commerce, in the preparation of and in the hauling of said passenger train, or

(*b*) Engaged in intrastate commerce, or

(*c*) Engaged in his own business and affairs, which was wholly unconnected with either of the two preceding.

That he could not have been engaged in "b" is perfectly manifest. This reduces the proposition down to what the defendant presents as its chief defense in the answer: That on the night and at the time the intestate passenger engineer came to his death, he was not doing any duty for the defendant or otherwise, but on the contrary he was a trespasser, without permission, or license of the defendant, in going into the roundhouse where he well knew and should have known, was in darkness and dangerous pits, into which he might fall, and in failing to look out for said pit or pits, and protect himself from falling therein. Was he upon his own business, unconnected with the movement of his engine and train? Whether he was upon his own business, unconnected with his employment, was the principal and vital issue of fact presented to the Court for the decision of the jury below. It was also the principal point urged before and determined by the State Supreme Court; and it is the principal point now presented to this Court: That is to say, it is contended that his actions were disconnected from his employment as an engineer engaged by the railroad company in the conduct of its interstate passenger transportation, or whether he was simply acting without any respect, regard or duty in the premises, or in the discharge of any right or

any obligation to the railroad company whatever in the interstate running of his engine, drawing No. 59 train. It is respectfully submitted that the issues, therefore, cannot be mistaken or evaded. It is, first, however, to be considered whether there was any negligence at all upon the part of the railway company towards the intestate; for, if there was no negligence whatever, then the company, under no law, statutory or common, could be held liable for his death, for there is no statute in South Carolina of common law existing and no statute of Congress making a railroad company an insurer or liable for accident to its employees unless coming within the terms of the Employers' Liability Act.

Having thus narrowed down the issue, whether there was any negligence upon the part of the railroad company, and whether such negligence comes within the terms of the Federal Liability Act, the plaintiff in error is compelled, at the outset, under this record, to show that there was no negligence upon the part of the company, which should have been submitted to the jury in the Court below, and to show that there was no casual connection between such negligence and the death of the intestate.

It is admitted, and stands without dispute, that the railroad company had removed the making up of its trains, or the preparation of its engines, for the hauling of its southbound and northbound trains from Columbia, its old terminal, to Cayce. It is admitted that for this purpose that for sometime the railroad company had in the course of construction a roundhouse with all of its necessary arrangements for watering and coaling its engines, and for the repair of same. (We do not, in this case, have anything to do with the train itself.) It is perfectly evident from the testimony that the railroad company was hastening the use of such roundhouse for such purposes, and that it was inadequately prepared at Cayce to do the very work which had heretofore been done at Columbia; and in some respects some of the work was done at Columbia, while some, at the same time, was done at Cayce.

However long may have been the employment of the intestate in the service of the railroad company as a freight engineer, it is perfectly obvious from the testimony that he could not have known and did not know of the conditions existing in the roundhouse, for the use of such roundhouse had only

commenced about one week before his death, and that he had become a locomotive engineer drawing a passenger train for a period which allowed him only two runs. The run that he was to take would have made his third run—without the knowledge, therefore, of the exact situation. It is also undisputed, notwithstanding the statements contained in counsel's brief, that the accommodations at Cayce were not adequate for the performance of the duties of and the use of the employees of the company. So that we have at once a case of a roundhouse, repair shop, coaling and watering arrangements not fully completed, nor adequate, and their condition not known or which could have been known to the intestate.

We next observe the fact that the engineer in bringing his train past Cayce carried it into Columbia, brought it back to Cayce at 10:50, Eastern time; that he there found he had a hot box on his engine, and before it could be used in the morning it would have to be remedied.

On his arrival at Cayce, from Columbia, he was advised that the engineer had turned up to carry the train, No. 43, that was stated to him he might be called upon to carry out, he registered off, then he stayed around there until he was informed, somewhere about midnight, that the other man would go on his regular run; therefore, that would leave him to go on his regular run. He then went up to the boarding house to get a room to go to bed, but found it filled up. Then he went back down to the roundhouse, got on engine No. 66, which the hostler was to take out next morning ten or fifteen minutes before his engine was to go out.

The question immediately arose in his mind, where should he go? He had to be called to take his regular train out with his regular engine, his train being No. 59 and his engine being No. 35. So as to be sure that he would not miss his train, or to have any mishap in going out with it, he went into the roundhouse and went to engine No. 66, knowing that that engine had to go out just before his engine, No. 35. This would give him an assured place of being awakened so as to carry his engine to Columbia, and there haul back, through Cayce, to Savannah, train No. 59. He went into the roundhouse, having no other place to go, and further knowing that if he did go to some other place the call boy, or those whose duty it was to awaken him, could not find him.

He, therefore, went upon engine No. 66, went to sleep, and just as he had arranged it, engine No. 66 was carried out at 4:30 o'clock Central time or 5:30 Eastern time, to the coal chute to be coaled and watered; he was there awakened by one of the hostlers, Horsford, and he then asked as to the whereabouts of his own engine, ascertaining, it must be presumed, what time it was.

The time when the repair should be made upon the hot box by the foreman of the roundhouse, or under his direction, is not fixed in the record, but it would be done between the time it was turned over to the hostler and the time it was to go out, or the time he was to be notified he was to go out. Being uncertain whether this had been done or not, and as the time, upon calculation will show, he went back to ascertain whether the hot box had been fixed. He was told by the hostler that it was on track No. 3. He started toward it and was not seen again until discovered dead in the drop-pit.

Hostler Horsford says (Record, page 44) that it was a part of his duty, so as to prevent any delay in taking his engine to Columbia to attach to train No. 59 that he (Padgett) should inspect his engine to see that proper repairs had been made. If he had waited until engine was brought out, coaled and watered he would have to have it carried back to the roundhouse and repaired, and within the thirty minutes claimed to be the only time that he was allowed, it could not be done, and he could not have reached Columbia in time to haul out No. 59.

It does not appear to have been the hostler's duty to see that the hot box was cleaned out and repaired. That was a matter for the roundhouse people. It was not the duty of the hostler, after the engineer had turned his engine over to him, to do more than to carry the engine into the roundhouse for repairs, and at the proper time, being prior to the time designated for the run, to carry it out, coal it and water it for the trip. It, however, was the engineer's duty of calling attention to the hot box when registering off.

When the intestate asked where his engine was, that he was to take out, we contend, that it was the duty or the right of the engineer, in order to make the run and make his proper connections, to ascertain whether the hot box had been properly packed. He, himself, was in the actual per-

formance of his duty, irrespective of the time when a call boy brings it to his attention, because he was then awakened. There was, therefore, no necessity of waiting for a call boy, but his duty to ascertain whether his engine was in a condition to be coaled and watered and carried over to Columbia.

It is certainly purely imaginary that this engineer went to his engine for the purpose of going to sleep. He had already rested for four hours in the cab of engine No. 66. He had previously reported that his engine needed repair, or fixing, in the particular mentioned. He knew that if the engine had been brought out by the hostler to the coal chute without such repair that it would have to be taken back to the roundhouse, causing necessary delay in reaching Columbia in time to haul train 59 upon schedule. He had no purpose in asking where his engine was located in the roundhouse, if there was any fixed place for him to take it from one of the side tracks where the hostler would place it. The inquiry was perfectly useless unless we attribute to him the purpose of ascertaining for himself whether such hot box had been fixed and the engine was in shape to make the run. The next engine to be taken out after No. 66 was his engine, No. 35. There was no cause for him to go to sleep. On the contrary, he considered himself in a position not to require the warning of the call boy, but to perform one of his duties of inspecting his engine before it left on its run. This he would have to do, even after the hostler had carried it out of the roundhouse to the coal chute and then upon the track to go to Columbia before he commenced his run. Hence, he was in the performance of one of his duties of looking after his engine to see that it was in a running condition. His action, we submit, was in advancing the interest of the company, and in one of the necessary performance of seeing that the engine was in proper state. The purpose for which he inquired about his engine and the object he had in view in proceeding to it, in view of all the surrounding circumstances, was a question of fact for the jury to determine. It is respectfully submitted that if he went there for the purpose of inspecting his engine, and with the idea of riding back on it with the hostler to the point of departure for Columbia, that he did so in the performance of one of the necessary things to be done in the final preparation to starting said engine on its way to engage in

the interstate transportation of train 59, running between Columbia and Savannah. That it was not beyond his duty or the practice or custom of engineers to do this we think is established by the testimony in the case.

BEARING OF THE RULES OF THE COMPANY UPON THE CASE.

The plaintiff in error introduced certain rules of the company with regard to the duties of engineers in relation to their engines. These rules will be found in the Record at page 136, and he cites rules Nos. 21, 23, 24 and 27, to which may be added rule 22 on page 110, which is not noticed by plaintiff in error. It contends that under these rules there was not only no duty, but no right of the engineer to look after, take care of, or give any attention, to his engine which he was accustomed to run; that is to say, it is the contention of the railroad company that as soon as an engineer, after bringing his engine (in this particular instance from Columbia back to Cayce), and the roundhouse, he had simply to notify and turn over his engine to a hostler and to report any defects in the engine at the registering office; that he was thereafter under no obligation, no right and by habit and custom recognized by the company could not enquire after, take care of, or direct his engine, until thirty minutes in advance of the leaving time of the train for which he was called to take care of. The testimony in the case, we respectfully submit, does not sustain this contention.

Rule 21, Record, page 136, obviously has no bearing upon the duty, right or obligation of the intestate engineer in this case upon this occasion.

Rule 22, Record, page 136, manifestly shows a diversity of time applicable to certain points and cannot be construed as not permitting an engineer to wake of his own accord and to look after his duties so far as he sees fit. It only binds the company that he shall receive timely notice before he shall be called to enter upon his duties. It cannot, therefore, in this instance, in any way be construed, if there be no other objection or reason contrary, as precluding the intestate engineer from being awake and attending upon his customary duties prescribed by the rules, by the practice and by the acquiescence of the railroad company. Rules may be waived by the company. Not only is this true from a construction of the rules,

but so from the evidence given in the case. Rule 22 (Record, p. 110) prescribes that the engineers will have to be called one hour and fifteen minutes before leaving time of train. The deceased was entitled to be called within this time.

The witness, Horsford, the hostler (Record, p. 44), was asked the questions:

"Q. State whether or not it was the engineer's duty to see that it was properly done before he took the engine out? A. He had to see before he left, before he went out.

Q. He had to see before he went out? A. Yes, sir.

Q. If he had to wait and inspect it down there at the coal chute, and it had not been done, he would have had to take it back to the roundhouse, and the train been delayed, and there would be delay in working the engine over? A. Yes, sir.

Q. That is correct, it is not? A. Yes, sir."

It will thus be observed that it was not the hostler's duty, as heretofore pointed out, to look after the repairs, but that attention had to be given by the engineer to his engine, even after he had turned the same over to the hostler and before he actually took charge of the same to commence his run with the engine back to Columbia, and from Columbia back through Cayce to Savannah.

It will thus be seen that the contention of the plaintiff in error cannot be sustained; that there was no duty under rule 22 for the engineer to look further after his engine until the same was placed upon the track for the purpose of moving it to Columbia.

Rule 23, Record, page 136:

> "23. Engineers will be required to take charge of their engines thirty minutes in advance of leaving time of train for which they are called."

This does not conflict with the testimony of the hostler or with the conclusion reached with regard to rule 22.

It will further be noticed that under rule 23 the place at which engineer shall take charge of his engine is not designated by rule nor could it otherwise arise than by practice, which may be varied and changed off and on,—that is to say, entirely dependent upon the practice recognized and engaged in by the engineers and those having direction of dispatching of engines.

Rule 24, Record, page 136, apparently can have no application in this case.

Rule 27, Record, page 136, is as follows:

> "27. Engineers will not be held responsible for engines after being relieved from duty."

When they are relieved from duty depends upon the practice and regulation in force at the time and the place. Whether the engineer is relieved absolutely from all care of his engine after it has been turned over to the hostler depends upon the fact and the testimony in the case.

We find first that such engineer, notwithstanding his engine is placed at a certain point, and taken charge of by the hostler, he still has to examine and inspect his engine and thereafter make a report thereon,—shows that his duty with regard to his engine is not suspended as soon as it is turned over to the hostler.

And, further, it appears from the evidence that a further duty rests upon him to see, before the engine was carried to the coal chute and water tank, for coaling and watering (see Record, page 44), that the engineer must be satisfied that the repairs requested by him, have been made, and to see to it that his directions to haul a certain train, to which he is assigned, shall be punctually carried out, as to cause no delay.

We thus find, from examination of these rules, which, while they may be construed by the Court, must be taken in connection with the actual practice and the customary handling of trains, recognized and acquiesced in by the company, they cannot, in the sense of being absolutely disposed of by the Court as a rule of law, but must be in connection with all the facts and circumstances of the case, be submitted to the jury to determine the true state and applicability thereto.

It must, therefore, be submitted that any contention that a passenger engineer of the Seabroard Air Line Railway, an interstate railroad company, engaged in running on a regular run of certain specified trains between Savannah and Columbia, has no duty in connection with his engine whatsoever before thirty minutes in advance of the leaving time of the train for which he is called.

In this case, the deceased engineer, under rules, had to be called one hour and fifteen minutes, and under rule 23, he was

required to take charge of his engine thirty minutes in advance of the leaving time of the train for which he is called. To carry out these rules, it would be necessary, in case the repairs were not made, for him, thirty minutes before train time, to take back the engine into the roundhouse, have it repaired or fixed, then run it two miles to Columbia, across the Congaree River, and there make connection with the train, No. 59, and bring it back to Cayce at schedule time.

The intestate, on account of the inadequate and defective arrangements of the plaintiff in error's yard and shops at Cayce, and the manner in which the operations of the company were conducted constituted serious derangement of its own rules as well as creating dangers to which its engineers and other employees were exposed, and which are charged in the complaint.

It, therefore, necessarily follows, as we respectfully submit, that defendant in error, intestate, cannot be chargeable with negligence himself, or with the assumption of any risk arising from this condition of affairs except what was brought to his knowledge or what could have been reasonably ascertained. No evidence in the case tends to show that he ever had any knowledge of these drop pits, or that the engine stood over them in such a way as to make it dangerous in approaching or attempting to get upon engines in the roundhouse.

Further, his action in awaiting until sometime after twelve o'clock at night to ascertain whether he was to take out some other engine in the roundhouse, and go to Columbia, across the Congaree River, couple up with train 43, known as the Limited Train, and to carry the same on to Savannah, was fully justified and was made at the direction of his superior officers. When, however, at the time he was advised that the regular engineer would be able to take his own run and carry train 43, he was in the exercise of full care in attempting to seek an opportunity for rest and sleep at the place provided for by the defendant railroad company, there being no other accommodation and no other sleeping place at Cayce. This being true, an act of omission upon the part of the railroad company to provide sufficient accommodations for its operatives, under the abnormal conditions that arose at this particular place, and at their own risk, to accelerate their business, so under these rules, knowing that he had to take out his own engine, if repaired,

and in condition, and to take up his regular run; that is to say, to carry train No. 59, from Columbia to Savannah, he sought the best course to pursue, knowing that he could be called within any time necessary to get hold of his engine and carry it to Columbia and attach it to train 59, and carry it thence to Savannah. And instead of lying upon the ground near the track, or at any other point where he might be in danger, he went to engine 66, which he knew would be attached to some train which would leave the roundhouse and thus necessarily awaken him from his sleep in time to take charge of his engine and carry it over to Columbia and bring back train No. 59.

A calculation and close inspection of the time, bearing in view the difference between Eastern and Central Time, will show that he had only a short time to perform this duty.

The testimony shows that while it was not customary, because the roundhouse, and the use of the roundhouse had not been commenced more than a week before his death, yet within that time employees had been allowed, with the knowledge of the company, on account of the inadequate facilities, to sleep in the cabs of the different engines in the roundhouse. (See Record, page 49.)

He took this course according to his expectation, as hereinbefore set out. When the hostler came to take charge of engine 66 and carry it out to the coal chute and water tank, to coal and water the engine, he found the engineer, intestate, asleep in the cab of engine No. 66. He woke him up and carried him to the chute, a short distance; there stopped his engine; the intestate, Padgett, instead of getting off and claiming that he had no right to look after his engine, or to pay any attention to it until thirty minutes in advance of the time of taking his engine into Columbia, inquired, "Where is my engine?" He was informed that his engine was on track No. 3. He went to find his engine for the deliberate purpose (as we contend) of seeing if the hot box had been packed during the night, and would be ready, after being properly coaled and watered, to carry train No. 59 to Savannah. He was seen going directly towards his engine in the roundhouse. Shortly thereafter, the hostler came, took charge of the engine, carried it to the coal chute, coaled and watered it, and placed it upon the track to be carried to Columbia. Engineer Padgett was not on hand. Delay could not be made, so prompt must be the

action, and so short a time was allowed to the engine to proceed to Columbia, across the Congaree River, to the terminal in Columbia, where train No. 59 stopped, ready to be connected with the engine, to haul the train southward to Savannah. Shortly thereafter the body of the missing engineer was found in the drop pit. When an engine or train stood over the same it was partially out of sight.

And, in the language of counsel, "Unguarded, open and unlighted." Irresistibly there can be but one conclusion: In going to his engine to inspect and examine it with regard to whether it was in condition to go out, so that no delay would be caused, or ascending its steps, not knowing of its dangers, alleged in the complaint, went to his death.

We submit, therefore, under any construction of any of these rules that they cannot bear out or sustain the contention of the plaintiff in error, but that the finding of fact of the jury, which in the light of all the circumstances, which show more brightly and clearly in the Court room, than can in a Court of appeals or of review, found, as a fact, that his death arose as alleged in the complaint; the cause of it was the unguarded and unlighted drop pit in the track.

The principles heretofore determined by this Court have been so explicitly set forth that it does not warrant us in doing more than refer to them generally.

In the case of *North Carolina Railroad Company* v. *Zachary*, 232 U. S., pages 248, 260, it was argued and claimed that, "So far as appears, deceased had not previously participated in any movement of interstate freight, and the through cars had not as yet been attached to his engine, his employment in interstate commerce was still *in futuro*. It seems to us, however, that his acts in inspecting, oiling, firing and preparing his engine for the trip to Selma were acts performed as a part of the interstate commerce, and the circumstances that the interstate freight cars had not as yet been coupled up is legally insignificant. See *Pederson* v. *Del., Lack. & Western R. Co.*, 229 U. S., 146, 151; *St. Louis & San Francisco Ry.* v. *Seale*, 229 U. S., 156, 161."

In that case it appeared that the deceased had left his engine and was going to his boarding house, engaged upon a personal errand and not upon the carrier's business. "Assuming (what is not clear) that the evidence fairly tended to indicate the boarding house as his destination, it nevertheless also appears that deceased was shortly to depart upon his run, having just

prepared his engine for the purpose, and that he had not gone beyond the limits of the railroad yard when he was struck. There is nothing to indicate that this brief visit to the boarding house was at all out of the ordinary, or was inconsistent with his duty to his employer. It seems to us clear that the man was still 'on duty,' and employed in commerce, notwithstanding his temporary absence from the locomotive engine. See *Missouri, Kansas & Texas Ry. Co.* v. *United States,* 231 U. S. 112, 119."

"We conclude that with respect to the facts necessary to bring the case within the Federal Act, there was evidence that at least was sufficient to go to the jury. It is doubtful whether there was substantial contradiction respecting any of these facts; but this we need not consider."

The Supreme Court of the State of South Carolina decided that a railway employee while engaged in relaying rail on a line of railroad is also within the Federal Employers' Liability Act while asleep at night in a shanty car of a train on a side-track, placed there for accommodation of such employee. *Sanders* v. *Charleston etc. Ry. Co.,* 97 S. C., page 50.

Considering all of the testimony and the reasonable inference to be drawn therefrom, it is submitted that no case can be cited which would deprive the jury in the State Court trying the issue of fact, whether the party complaining was an employee of an interstate carrier was injured at the time he was employed by the company in such interstate commerce. This necessarily follows because of concurrent jurisdiction of the State Court to entertain such case and to try them according to the procedure and evidence prevailing in the State Court and of the jurisdiction exercised by them. It may be thoroughly conceded that under the case of *St. L. & Iron Mt. Ry.* v. *McQuerter,* 229 U. S., 265, that if there is no legal evidence tending to show that the complainant was so engaged at the time of his injury, that this Court, notwithstanding the decision of the trial Court, and of its affirmance by the appeal Court of the State, in the exercise of its jurisdiction over this Federal Statute would reverse the decisions below; yet, in all of such cases, both the State Supreme Court, as a Court of error, and this Court, as a Court of error, will not reverse the finding of the trial jury under proper instruction, and when the Supreme Court of the State has affirmed such finding of fact, if there be evidence in the record to support the finding of fact that the party complainant was engaged at the time of

injury in interstate commerce, will not set aside the finding of fact of a jury, or of an inferior Court in cases of law.

"APPEAL REVIEW OF VERDICT.—A verdict in favor of plaintiff in an action for death should not be set aside by an Appellate Court for the lack of evidence to support it unless the testimony was such that no recovery could be had upon the facts shown in any view which can properly be taken of them."

Meyers v. *Pittsburg Coal Co.*, 233 U. S., p. 184, 58 Law Ed., p. 907.

"The evidence upon the merits of the case, though obscure, and meager as to the circumstances of the accident, was such as to justify its submission to the jury."

American Railroad Co. of Porto Rico v. *Federico Didricksen*, 227 U. S., p. 145, 57 Law Ed., pp. 456, 457.

"Employees, though inactive, are none the less on duty within the meaning of the Hours of Service Act of March 4th, 1907, penalizing carriers for keeping their employees on duty more than sixteen consecutive hours, where they are under orders, liable to be called upon at any moment and not at liberty to go away.

Missouri, Kansas & Texas Railroad Co., of Texas, and *American Surety Co., of New York,* v. *U. S.*, p. 112, U. S., Vol. 231, 58 Law Ed., p. 144.

W. BOYD EVANS,
Attorney for Defendant in Error.

FILED
JAN 8 1915
JAMES D. MAHER
CLERK

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1914.

No. 710

SEABOARD AIR LINE RAILWAY, PLAINTIFF IN ERROR,

vs.

CLARA V. PADGETT, Administratrix of the Estate of Lewis H. Padgett, Deceased, DEFENDANT IN ERROR.

ON WRIT OF ERROR TO THE SUPREME COURT OF SOUTH CAROLINA.

Brief for Plaintiff in Error, Opposing Motion to Dismiss or Affirm.

J. B. & LYLES,
Attorney for Plaintiff in Error.

THE STATE CO., PRINTERS, COLUMBIA, S. C.

INDEX

PAGE

Statement of plaintiff in error.. 1

Issues raised by pleadings.. 2

Statement of the evidence.. 3

Motion to Dismiss

1. That the right, privilege or immunity claimed by defendant below under the Federal Employers' Liability Act was not specially set up or claimed by defendant within Section 237 of the Judicial Code.. 10

3. That this Court will not review the findings of fact in the lower Courts.. 16

Erroneous legal conclusions of State Court upon facts found.. 20

2. That the ninth assignment of error does not present a Federal question.. 21

Motion to Affirm

Is there evidence that intestate came to his death "while employed in interstate commerce" within the Act?.. 22

Is there evidence of negligence proximately resulting in the death of plaintiff's intestate?.. .. 23

Assumption of Risks.. 24

Conclusion.. 25

The Motion to Advance.. 25

TABLE OF CASES

	PAGE
Baker vs. Telegraph Company, 84 S. C., 477	12
Benson vs. Lancashire & Yorkshire Ry. Co., 1 King's Bench, 242	23
Buist Co. vs. Lancaster Co., 68 S. C., 526	14
Crosby vs. Ry., 83 S. C., 575	13
Crosby vs. Ry., 81 S. C., 31	22
Dent vs. Bryce, 16 S. C., 1	14
Ellsworth vs. Metheny, 104 Fed., 119	23
Grand Trunk Ry. Co. vs. Lindsay, 233 U. S., 838	11
Guess vs. A. C. L. Rd. Co., 88 S. C., 87	12
Illinois Cent. Rd. Co. vs. Behrens, 233 U. S., 473	22
Jones vs. C. & W. C. Ry., 98 S. C., 197	12
McCord vs. Blackwell, 31 S. C., 138	14
Michigan Cent. Ry. Co. vs. Vreeland, 227 U. S., 59	11
Miedreich vs. Lanenstein, 232 U. S., 236	16
Mondou vs. Ry., 223 U. S., 1	11
Murphy vs. Rd. Co., 89 S. C., 15	24
N. C. Ry. Co. vs. Zachary, 232 U. S., 248	16
Patton vs. T. & P. R. Co., 179 U. S., 658	22
Pedersen vs. Rd. Co., 229 U. S., 150	22
Russell vs. Short Line Rd. Co., 155 Fed., 22	23
Scheffer, 105 U. S., 449	24
Seaboard Air Line Ry. vs. Duvall, 225 U. S., 477	11
Seaboard Air Line Railway vs. Horton, 223 U. S., 492.	21
St. Louis, S. R. Co. vs. Harvey, 144 Fed., 806	23
St. Louis, I. M. & S. R. Co. vs. Hesterly, 228 U. S., 702.	16
St. Louis, I. M. & S. R. Co. vs. McWhirter, 229 U. S., 265	16
Stone vs. A. C. L. Rd. Co., 96 S. C., 228	12
Thompson vs. Lee, 19 S. C., 489	14
Towles vs. Ry., 83 S. C., 504	14
Wyatt vs. Cely, 86 S. C., 539, 544	12

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1914.

No. 710

SEABOARD AIR LINE RAILWAY, PLAINTIFF IN ERROR,

vs.

CLARA V. PADGETT, Administratrix of the Estate of Lewis H. Padgett, Deceased, DEFENDANT IN ERROR.

ON WRIT OF ERROR TO THE SUPREME COURT OF SOUTH CAROLINA.

Brief for Plaintiff in Error, Opposing Motion to Dismiss or Affirm.

J. B. S. LYLES,
Attorney for Plaintiff in Error.

STATEMENT FOR PLAINTIFF IN ERROR.

The statement of defendant in error is so misleading in essential particulars that it is deemed necessary to present to the Court a complete statement of the case.

The writ of error brings up a judgment of the Supreme Court of South Carolina, filed November 18th, 1914, affirming a judgment of the Court of Common Pleas for Lexington County, South Carolina, in the sum of $20,000 and costs entered on a verdict in favor of plaintiff below.

The suit was a civil action commenced on June 20th, 1913, by the plaintiff, Clara V. Padgett, administratrix of the estate of Lewis H. Padgett, deceased, for the benefit of herself and eight dependent children, against Seaboard Air Line Railway, defendant, under the Federal Employers' Liability Act of Congress, to recover damages for the death of said intestate, alleged to have been caused by the negligence and wrongful acts of the defendant on January 12th, 1913, while said intestate was employed by defendant as a locomotive engineer in interstate service.

The references made are to the printed transcript of record.

ISSUES RAISED BY PLEADINGS.

The complaint alleged that the defendant was an interstate carrier engaged in the conduct of a general railroad business in and through the States of Virginia, North Carolina, South Carolina and Georgia, and that it owned and controlled a railroad yard composed of several tracks, roundhouse and other appurtenances at Cayce, in Lexington County, South Carolina (Complaint, paragraphs 2 and 3, R. p. 2). This was admitted by the answer (Answer, paragraphs 2 and 3, R. p. 5). The complaint further alleged that at the time of his death, plaintiff's intestate was discharging his duties as an interstate employee and was in the service of the defendant as a locomotive engineer, running between the city of Savannah, Georgia, and Cayce, Lexington County, South Carolina, and that on the night of his death, the said intestate, in the discharge of his duties as such locomotive engineer in interstate service, went into the roundhouse of the defendant in its Cayce yards and there met instant death by falling into a drop pit. (Complaint, paragraphs 3-7, R. pp.2, 3.)

The answer admitted the death of intestate, but denied the allegations of fact to the effect that he was in the service of the defendant or discharging any duties incident to his employment when he went into the roundhouse and fell into the pit. (Answer, paragraphs 3-7, R., p. 5.) The answer

further set up as a second defense that intestate did not go into the roundhouse in the performance of any duties as engineer for defendant, but, on the contrary, without even permission or license of defendant, and as a trespasser. (Second defense, R. pp. 5-6.)

The complaint further alleged that the death of intestate was caused by the negligence of the defendant, its officers, agents and employees, in allowing the roundhouse at Cayce to be used before completed and while in an unsafe and dangerous condition, and directing and permitting intestate to go to his engine, which was in the roundhouse standing over an open and unprotected pit, in the nighttime, with no lights or other protection therein, and further in not relieving intestate from duty on the night he was killed, but on the other hand, holding him on duty and in suspense during the night. (Complaint, paragraphs 8, 9, R. pp. 3, 4.) The answer denied these allegations of negligence (Answer, paragraphs 8 and 9, p. 5). The answer further set up, as a third defense, contributory negligence on the part of intestate, and as a fourth defense, assumption of risks on the part of intestate (R., p. 6). The complaint specifically alleged that the action was brought under an Act of Congress, passed April 22, 1908, and amendments thereto, known as the Federal Employers' Liability Act (Complaint, paragraph 5, p. 3).

STATEMENT OF EVIDENCE.

The statement of the evidence given in the statement of defendant in error is entirely misleading in certain essential particulars, and as an understanding of the undisputed testimony, together with all reasonable inferences to be drawn therefrom, will, in our opinion, largely conclude the questions now before the Court, we undertake to give such a statement as follows:

The roundhouse of defendant in its Cayce yards was built to house engines temporarily, and was put into service on January 5th, 1913, just one week before intestate's death. The roundhouse is semicircular in shape and

contains ten tracks, which converge at its entrance so as to allow engines to be run into it upon any one of these tracks, from a single track turntable, located immediately in front of the roundhouse, to the south, in which direction the roundhouse opens. Between and under the rails of each of these tracks is a pit some four feet in depth, running the entire length of each track in the roundhouse, so that machinists can go underneath the engines on such tracks for the purpose of repairing them. In addition to the pits beneath and under each of these tracks, there is another pit some seven feet in width and ten feet ten inches in depth, which runs between tracks two and three, at right angles to them. This is a drop pit, so-called because used for the purpose of dropping driving wheels off of an engine on one of these tracks and transferring the wheels to the other track upon which they are taken out. This is the pit in which intestate was found dead on the morning of January 12th, 1913. (Witness Cline, pp. 7-8; Chisolm, pp. 17-18; Garrett, pp. 55-56, 58-60, 65-66.)

Plaintiff contended that the roundhouse was incomplete because the drop pit had not been covered and no lights had been installed in the roundhouse. Defendant contended that the roundhouse was complete. There is no evidence in the record that the pit was subsequently covered or lights subsequently installed in the roundhouse. The trial Judge overruled the efforts of plaintiff's attorneys to introduce such evidence. (Cline, p. 9; Chisolm, p. 18; Horsford, p. 48; Hooper, p. 65; Garrett, pp. 66-71.)

The evidence was undisputed that no lights were installed in the roundhouse and the pit was uncovered at the time of intestate's death. (Cline, pp. 8, 14-15; Wallace, p. 25; Riggs, p. 30; Horsford, p. 48; Hooper, pp. 64-65.) The evidence was, however, that the roundhouse and pit were completed according to specifications. (Garrett, pp. 66-71.)

Intestate had been in the service of defendant as a freight engineer for a number of years. He had been pro-

moted to his passenger run on the same day that the roundhouse was put in service. His run was local passenger No. 59, from Cayce to Savannah, scheduled to leave Cayce at 6:10 a. m., Central time, and the corresponding train, No. 62, from Savannah to Cayce, scheduled to arrive at Cayce at 8:50 p. m., Central time. He went down one day and back the next. He had made three trips into the Cayce yards on this run since the roundhouse had been in use, and had, of course, made numerous trips as a freight engineer during the construction of the roundhouse. On the day in question he left his home in Savannah at 3 p. m.

Under the agreement between the engineers, including the plaintiff, and the defendant company, effective at the time of intestate's death, and containing the rules and regulations specifying the duties and work of engineers, hostlers and machinists were provided at the Cayce yards to take entire charge of engines brought into the Cayce yards by engineers, and make such engines ready to go out upon their runs (Rule 24, R. p. 136). The Cayce yards were a part of the Columbia terminals (two miles distant) and this rule applied there (R. p. 80). Rule 27 provided: "27. Engineers will not be held responsible for engine after being relieved from duty." Rule 23 provided: "23. Engineers will be required to take charge of their engines thirty minutes in advance of leaving time of train for which they are called." (R. p. 136.) In construing these rules, the trial Judge very properly charged the defendant's requests 18, 19 and 20, as follows:

"18. Under Rule 21 of the contract between the engineers and the company, no engineer could call any engine 'his engine.' The engines belonged to the company, and it could furnish any engine for any run." I charge you that.

"19. Rule 27 is clear that engineers are not responsible for, or under any duty connected with his engine after he is relieved from duty." I charge you that.

"20. Under Rule 23, an engineer has no duty to perform in connection with his engine before thirty minutes in ad-

vance of the leaving time of the train for which he is called." I charge you that.

(R. p. 147.)

Any apparent inconsistency among the witnesses as to the time given in their testimony is probably caused by the fact that the time changes at Cayce, Central time prevailing from Cayce to the south, and Eastern time prevailing from Cayce to the north. The time given in the schedule, at page 137 of the record, is Central time.

On the night of January 11th, intestate came into Cayce on No. 59 at 8:50 p. m., Central time, or 9:50, Eastern time. He was required to bring his train on through the Cayce yards to the Columbia terminal, where the train was cut off, and then intestate ran his engine back to the Cayce yards. Upon arriving at the Cayce yards, his duties required him to place his engine in one of the several sidetracks, used for the purpose of accommodating engines brought in by engineers from their runs and engines placed by hostlers to be taken charge of by engineers going out on their runs. These tracks were located in the vicinity of the yard office and between the yard office and the roundhouse. They were distinct and separate from the roundhouse, that is, they were not in the roundhouse. These tracks were a part of the yards, although engines left thereon were frequently taken into the roundhouse by hostlers by way of the turntable, when it was proper so to do. The engineers never took the engines into the roundhouse and never brought engines out of the roundhouse. They left the engines on these tracks when they came in from their runs, and they received and inspected their engines on these tracks before they went out on their runs. Intestate had his choice as to which of these tracks he would choose to leave his engine on, the only requirement being that he clear the main line. (Riggs, pp. 29, 32, 38-41; Horsford, pp. 50-51.)

Intestate did in fact stop his engine just clear of the yard master'e office, which was about one thousand feet north of the roundhouse, some time before 10:30 p. m., Cen-

tral time. This was after he had brought his engine back from the Columbia terminal to the Cayce yards. Intestate was then required to make an inspection of his engine at this place, and at this time, and to make out a work report if anything was necessary to be done to the engine before it went out upon its next run. He was then required to go, and actually went, into the machine shop where the book was kept upon which engineers registered off. This machine shop was in the same general building and under the same roof as the roundhouse, but it was a separate and distinct room from the roundhouse, separated therefrom by a cement partition. To go into this machine shop from the tracks up towards the yard master's office, where engineers left and received their engines, and where Padgett had actually left his engine, it was neither necessary nor convenient to go into that room or portion of this building designated as the roundhouse, and wherein the pit in question was located. The machine shop was a room north of the roundhouse and between the roundhouse and the tracks on which the engines were left, and to go into the machine shop from such tracks, ingress and egress were had by a door on the north side of the machine shop room, that is, the opposite side from the roundhouse room, making it neither necessary nor convenient to pass through the roundhouse, which was to the south of the machine shop. The act of registering on and off was the only duty which carried engineers even within the vicinity of the roundhouse building, and at the time of Padgett's death the registry book was in the machine shop, and the proper mode of ingress and egress to this room and the registry book would not carry engineers even within the room known as the roundhouse, wherein the drop pit was located. (Garrett, pp. 56-57, 72-73; Purvis, pp. 79-90; Radford, pp. 91-95, 98-103; Freeman, pp. 103-108, 110-112, 115-118; Beville, pp. 120-122, 124-126.)

After leaving his engine, No. 35, on the track near the yard master's office, intestate went to the machine shop where he registered off in his own handwriting as follows:

"Date Jan. 11/ Section ——/ Train 62/ Engine 35/ Relieved 10:30 p. m./ Engineer Padgett/ Fireman McDonald/ No. of hours off duty before beginning this trip —/ No. of hours on duty making this trip —/ Remarks. Rest Claimed, New Address, Leave of Absence, Etc.——" It is presumed that Padgett inspected his engine before leaving it at the yard master's office, and if he had found any work to be done upon it, it was his duty to have made out a work report at the engine and then filed it in a box provided for this purpose at the same place that the registry book was located, that is, in the machine shop. It does not appear that any work report was so made out by Padgett at this time or at the conclusion of this trip up on train No. 62. The statement of the defendant in error to this effect is entirely incorrect. (Lindler, pp. 131-132.)

This concluded Padgett's duties and he had no further duties to perform until after being called one hour and fifteen minutes before the departure of train No. 59 on the morning of the 12th, scheduled to leave at 6:10 a. m., Central time (p. 137), and then he would be required to take charge of his engine on one of the tracks up near the yard master's office at 5:40 a. m., Central time (Rules 22, 23, p. 136).

Plaintiff attempted to establish that Padgett was instructed to hold himself ready to go back to Savannah on train No. 43, scheduled to leave at 11:49 p. m., on the 11th, Central time (pp. 44-45), but this witness admitted that before train No. 43 left, Padgett knew that he would not be required to go out on this train, but would await his regular run (pp. 49-50). Purvis, Superintendent, stated that he never contemplated using Padgett as engineer on No. 43; that he did contemplate using Padgett's engine, No. 35, but that this idea was changed before No. 43 left, and Padgett was so informed (p. 78).

The witnesses agreed that Padgett was in Cayce after having registered off at 10:30 p. m., Central time, and that he remained talking to Engineer Radford until about 12:30 a. m., Central time, when Radford backed his engine out to

take No. 43 (pp. 91, 92). He then went over to a hotel run by an outsider, Darden, with Engineer Freeman (pp. 106, 107). He was then seen by the witness, Cline, about 1:30, going toward the roundhouse (p. 10). When the engine that went north on train No. 66, scheduled to leave about 4:25 a. m., on the 12th, Central time, was taken out of the roundhouse, Padgett was found asleep on this engine (p. 137). The witnesses place this at about 4 o'clock in the morning, evidently speaking of Eastern time, which would make it 3 o'clock, Central time. Plaintiff then endeavored to establish by this hostler's crew that Padgett, having ridden out to the coal chute on this engine, made inquiry as to where his engine was, was informed that it was on track No. 3 in the roundhouse, and that Padgett went back to the roundhouse for the purpose of seeing if the boxes had been packed. The trial Judge, however, struck out all such testimony, and the only evidence in the record is that Padgett was seen going back to the roundhouse about 4 o'clock, Eastern, or 3 o'clock, Central time. (Cline, p. 13; Riggs, pp. 31-33; See pp. 34-37; Horsford, pp. 43-46.)

Padgett's engine was never placed in the roundhouse during the night of the 11th and 12th. On the engineer's registry book, Padgett's engine was registered as No. 35 after this trip. On a stub of the time slips, which was produced from plaintiff's possession, and on the stub of which, covering this trip, erasures had been made, which have never been explained by plaintiff, his engine was given as No. 67. If written by Padgett this stub was evidently written during his trip up to Cayce. The witnesses, Cline, Wallace, Riggs and Horsford, attempted to testify that Padgett's engine was in the roundhouse, but they each admitted that they did not know whether it was 35 or 67 (pp. 13-14; 24-25, 26-27; 30-33, 35; 46, 47, 52). Freeman testified that he brought in engine 67 on the night of the 11th from Savannah (pp. 103-104). Beville testified that Padgett had been running engine 67 before the night of the 11th, but that Padgett came in on No. 35 on the night of the 11th, and Beville took out engine No. 67 on the morning of

the 12th (pp. 119, 120). Aldridge testified that Padgett came in on engine No. 35 and that this engine was to go out on train No. 59 the next morning; that he had charge of this engine when it came in and placed it ready for going out, and that the engine was never in the roundhouse (pp. 127, 128). Padgett was never located by the call boy when the call boy went out about 5:45 a. m., Eastern time, to find him to go out on train No. 59 at 6:10 a. m., Central time (p. 26), and he was later found dead in the pit.

I.

THE MOTION TO DISMISS.

The motion to dismiss is founded upon the grounds:

1. That the right, privilege or immunity claimed by defendant below under the Federal Employers' Liability Act was not specially set up or claimed by defendant within Section 237 of the Judicial Code.

2. That the ninth assignment of error (R. p. 163) does not present a Federal question, and,

3. That this Court will not review the findings of fact in the lower Courts.

We shall undertake to answer each of these propositions out of order.

1. That the right, privilege or immunity claimed by defendant below under the Federal Employers' Liability Act was not specially set up or claimed by defendant within Section 237 of the Judicial Code.

From the statement of facts preceding, the Court will see that the complaint specifically alleged that the defendant was a common carrier by railroad, engaged in commerce between several of the States, and that plaintiff's intestate was injured by the negligence of the defendant while he was employed by the defendant in such commerce. These are the essential allegations, determining the application, and, consequently,

the exclusive jurisdiction of the Federal Act. *Seaboard Air Line Railway vs. Duvall*, 225 U. S., 477, 56 L. ed. 1171; *Grand Trunk Ry. vs. Lindsay*, 233 U. S., 838, 58 L. ed., 838. The cause of action was, therefore, predicated entirely upon the Federal Act, which superseded all State law governing the same field, although the latter might have given to plaintiff a cause of action in the absence of the existence of the Federal Act. The Federal Act is exclusive, independent, self-sufficient, supreme. It can not be interfered with, pieced out or detracted from by any State law—common, statutory or constitutional. *Mondou vs. Ry.*, 223 U. S., 1, 56 L. ed., 327; *Michigan Cent. Ry. vs. Vreland*, 227 U. S., 59, 57 L. ed., 417.

At the conclusion of the testimony in the trial Court, the defendant made the following motion and the trial Court the following ruling thereon:

The defendant moves the Court for the direction of a verdict in its favor upon the following grounds:

1. Because there is an entire failure of evidence to support the material allegations of the complaint.

2. Because the plaintiff has failed to produce evidence admitting of the inference that Lewis H. Padgett was employed in interstate commerce at the time of his injury and death.

3. Because the entire evidence does not admit of the inference that Lewis H. Padgett, plaintiff's intestate, was employed in interstate commerce at the time of his injury and death.

4. Because the entire evidence does not admit of the inference that there was any negligence on the part of the defendant, its agents, servants or employees, proximately causing or contributing to the death of plaintiff's intestate.

5. Because, upon the entire evidence, the only inference is that plaintiff's intestate assumed the risks of the dangers and defects causing his injury and death.

The Court (after hearing arguments) said: Gentlemen, we have been taking testimony in this case for two days. Now, if there is any testimony whatever in that record, it

has got to go to the jury. You know a scintilla of testimony is a very minute piece of testimony, and I will say there is a scintilla somewhere in that record, and I am going to overrule the motion and let the jury decide the case. (R., pp. 137, 138.) This motion was made pursuant to Rule LXXVII of the Circuit Courts of South Carolina, as follows: "Objections for Want of Evidence—Remedies.—The point that there is no evidence to support an alleged cause of action shall be first made either by a motion for nonsuit or a motion to direct the verdict, and the point that there is no evidence to support a defense shall be first made by motion to direct a verdict." Code of Laws of South Carolina, 1912, Volume II, p. 756.

The Supreme Court of South Carolina has uniformly sustained this practice, and when a motion is made to direct a verdict at the conclusion of the testimony, as was done in this case, it then becomes a question of law for the Supreme Court to determine whether the Circuit Court committed error in refusing such motion. *Guess vs. A. C. L. Rd. Co.*, 88 S. C., 87; *Wyatt vs. Cely*, 86 S. C., 539, 544; *Baker vs. Telegraph Company*, 84 S. C., 477. See the application of this rule of practice in the Supreme Court of South Carolina in a case arising under the Lord Campbell's Act of South Carolina, *Stone vs. A. C. L. Rd. Co.*, 96 S. C. 228, and also to the point properly made in a case governed by the Federal Act, *Jones vs. C. & W. C. Ry.*, 98 S. C., 197 (Advance Sheet No. 2).

The disposition of such a question in the Supreme Court of South Carolina is provided by Rule XXVII of that Court as follows:

"Reversal for Lack or Failure of Evidence.—Whenever an appeal to this Court is sustained on the ground that a nonsuit should have been granted or a verdict directed because of a total failure of evidence or because the evidence could admit of but one inference, the reversal of the judgment shall have the same effect as if the nonsuit had been ordered, or a verdict returned under the direction of the Circuit Judge: *Provided*, That this rule shall not be ap-

plicable when the cause of action was not barred by the statute of limitations, at the time said orders were referred on circuit, but would be barred at the time they were reversed by the Supreme Court."

Code of Laws of South Carolina, Volume II, p. 731. See the application of this rule in *Crosby vs. Ry.*, 83 S. C., 575.

The practice in the trial Courts of South Carolina, the Courts of Common Pleas, does not require the saving or making of an exception before the jury leaves the bar or at any time before the rendition of verdict or entry of judgment. This practice is governed by Section 384 of the Code of Civil Procedure of South Carolina (Code of Laws of South Carolina, 1912, Volume II, p. 147), which provides as follows:

> "384. Notice of Intention to Appeal—Serving Case With Exceptions—Objections and Alterations.—1. In every appeal to the Supreme Court from an order, decree or judgment granted or rendered at chambers, from which an appeal may be taken to Supreme Court, the appellant or his attorney, shall, within ten days after written notice that the said order has been granted or decree or judgment rendered, give notice to the opposite party or his attorney of his intention to appeal, and in all other appeals to the Supreme Court the appellant or his attorney shall, within ten days after the rising of the Circuit Court, give like notice of his intention to appeal to the opposite party or his attorney, and within thirty days after said notice the appellant or his attorney shall prepare a case with exceptions and serve them on the opposite party or his attorney. The respondent within ten days after service of such case may propose any objections thereto or alterations thereof, and the case should be settled in such mode as may be provided in the rules of the Supreme Court: *Provided*, That whenever a motion for a new trial upon the Judge's minutes shall have been made, and the decision thereon not be both heard and

filed at the term at which the trial is had, then notice of intention to appeal either from the judgment or the order granting or refusing a new trial shall be given to the opposite party or his attorney within ten days after written notice that such order has been granted or rendered."

It will be observed from pages 148 and 149 of the record that notice of intention to appeal, and the case and exceptions on appeal to the Supreme Court of South Carolina were duly served, it being entirely permissible for the time for the service of the case and exceptions to be extended by agreement, and a reference to page 153 of the record will show the stipulation between counsel concluding this proposition. A reference to exceptions II, III, IV, V and XI, pp. 149-152 of the record, will show that the rulings of the trial Court upon the grounds advanced for the direction of a verdict in favor of the defendant were properly saved for consideration by the Supreme Court. The rulings of the Supreme Court of South Carolina upon this question are particularly assigned as error for the consideration of this Court by assignments of error 1, 4 and 7 (R. pp. 160, 161, 162).

The practice in South Carolina also provides that the charge of the trial Judge is the law of the case, and that the verdict of the jury must conform to the law, so that if there be no evidence to support the verdict under the charge, a motion for a new trial on the minutes, on such ground, raises a legal question, which, upon exception duly saved, within thirty days after the service of notice of intention of appeal (or this time duly extended), raises a question of law for the consideration of the Supreme Court. *Dent vs. Bryce,* 16 S. C., 1; *Thompson vs. Lee,* 19 S. C., 489; *McCord vs. Blackwell,* 31 S. C., 138; *Buist Company vs. Lancaster Co.,* 68 S. C., 526; *Towles vs. Ry.,* 83 S. C., 504. This rule does not obviate the necessity of complying with Circuit Court Rule LXXVII, but it is commonly adopted to raise such legal questions on a motion for a new

trial, so as to give the opportunity for extended argument, and give the trial Judge an opportunity to correct his rulings on the motion for the direction of a verdict, if persuaded of error. We call attention to the grounds of defendant's motion for a new trial on the minutes numbered 1, 2, 3, 4, and 5 (R. pp. 147, 148). The defendant's requests referred to in such grounds are found in the trial Judge's charge beginning at the bottom of page 143 of the record. We also call attention to the fact that the ruling of the trial Court on each of these grounds, respectively, were saved for the consideration of the Supreme Court of South Carolina by Exceptions VI, VII, VIII, IX and X (R., pp. 150, 151); and that the rulings of the Supreme Court of South Carolina upon such exceptions are saved in the essential particulars for the consideration of this Court by the specific assignment of errors numbered 2 and 5 (pp. 160-161).

These considerations show that at the first possible moment, and in the first possible Court, the defendant below made the point as required by the State practice, to wit: 1st. That there was no evidence that plaintiff's intestate was employed in interstate commerce at the time of his death, within the meaning of the Federal Act. 2nd. That there was no evidence of negligence on the part of defendant towards plaintiff's intestate, within the meaning of the Federal act; and, 3rd. The only inference to be drawn from the testimony was that plaintiff's intestate assumed the risks of the dangers causing his death, within the meaning of the Federal Act; and a reference to the majority opinion will show that the Supreme Court of South Carolina considered these essential points which were the immunities claimed by the defendant below under the Federal Act, and that such decision was against such rights and immunities specially set up and claimed by defendant within Section 237 of the Judicial Code.

In one of the latest utterances of this Court, it is expressly decided that a Federal question will be regarded as properly raised at the proper time and place in instances

where the State Court of last resort holds that such "question is made before it, according to its practice," and proceeds to determine it. *Miedreich vs. Lanenstein*, 232 U. S., 236, 58 L. ed., 584; and in *N. C. Ry. Co. vs. Zachary*, 232 U. S., 248, 58 L. ed., 591, it is expressly held that, as "the highest Court of the State either decided or assumed that the record sufficiently presented a question of Federal right, and decided against the party asserting that right, the decisions of this Court render it clear that it is our duty to pass upon the merits of the Federal right and Federal question," and this Court again in *St. Louis, I. M. & S. R. Co. vs. Hesterly*, 228 U. S., 702, 57 L. ed., 1031, said, in answer to an objection that the Federal question was not properly raised, that as the Supreme Court of the State had treated the request "for a ruling that the plaintiff could not recover damages for pain," as intended to raise the question, the objection was not an open one in this Court. We respectfully submit that these considerations show a conclusive answer to the first point made in the motion to dismiss.

3. That this Court will not review the findings of fact in the lower Courts.

In *St. Louis, I. M. & S. R. Co. vs. McWhirter*, 229 U. S., 265, 57 L. ed., 1179, the serious contention advanced against the jurisdiction of this Court to review the facts was that the complaint stated a cause of action at common law as well as one under the Federal Employers' Liability Act, combined with an alleged delict under the Safety Appliance Act, and since the judgment of the Court of Appeals of the State of Kentucky could be referred to the cause of action at common law, it did not necessarily involve a denial of a right or immunity of defendant under the Federal statutes and this Court was without jurisdiction to review the facts. There can be no such contention in this case, as the cause of action here is entirely and absolutely predicated upon the Federal Employers' Liability Act.

In the *McWhirter* case, it appears that "at the conclusion of all the evidence, the defendant requested the Court to instruct the jury to find in its favor. The Court refused to do so, and an exception was noted." (229 U. S., 274.) A motion to dismiss was made upon the grounds stated above and the answer of this Court thereto is so conclusive of the questions made in this case that we are content to rely upon it.

This Court said:

> "The contention wants foundation in fact. As we have seen, the pleadings in express terms, exclusively based the right to relief upon the statutes of the United States, and no non-Federal ground was either presented below or passed upon. It is true that, although the case was exclusively rested upon Federal statutes, as it comes here from a State Court, our power to review is controlled by Rev. Stat., Sec. 709, U. S. Comp. Stat. 1901, p. 575, and we may, therefore, not consider merely incidental questions not Federal in character, that is, which do not in their essence involve the existence of the right in the plaintiff to recover under the Federal statute to which his recourse by the pleadings was exclusively confined, or the converse, that is to say, the right of the defendant to be shielded from responsibility under the statute because, when properly applied, no liability on his part from the statute would result. *Seaboard Air Line R. Co. vs. Duvall,* 225 U. S., 447, 56 L. ed., 1171, 32 Sup. Ct. Rep., 790; *St. Louis, I. M. & S. R. Co. vs. Taylor,* 210 U. S., 281, 52 L. ed., 1061, 28 Sup. Ct. Rep., 616. And, of course, as the cause of action alleged was exclusively placed on the Federal statute, and the defense, therefore, alone involved determining whether there was liability under the statute, the mere statement of the case involved the Federal right and necessarily required, from a general point of view, its determination. *Swafford vs. Templeton,* 185 U. S., 487, 46 L. ed., 1005, 22 Supt. Ct.

Rep., 783. If, as is inferable from the argument, reliance is placed on the ruling of the Court below that there was evidence tending to show negligence on the part of the engineer, for the purpose of establishing that even if a Federal question was passed upon, the case was also decided on an independent non-Federal ground, broad enough to sustain the judgment, the proposition is without merit. The mere ruling that there was evidence sufficient to authorize consideration of the case from the point of view of negligence alone affords no basis for saying that the case was decided on such ground. Mere conjecture may not be indulged in for the purpose of concluding that because there was a potentiality of considering the case from a non-Federal point of view, therefore it was considered and decided in that aspect. But it was long since pointed out in *Neilson vs. Lagow*, 12 How., 98, 13 L. ed., 909, the Court, speaking through Mr. Justice Curtis, that to admit that the authority to review the action of a State Court where it has decided a Federal question can be rendered unavailing by a suggestion 'that the Court below may have rested its judgment' on a non-Federal ground, would simply amount to depriving this Court of all power to review Federal questions if only a party chose to make such a suggestion. But, aside from this, the argument, when rightly considered, reduces itself to this: that the power to review a Federal question which has been expressly decided by a State Court does not obtain where such Court has also decided another Federal question. This is true since the finding that there was some evidence to go to the jury on the subject of negligence independently considered was necessarily a ruling against the binding instruction asked at the close of the testimony, upon the assumption that there was nothing adequate to go to the jury to show liability under the Federal law. While it is true, as we have said, that, coming from a State Court, the power to review is controlled

by Rev. Stat., Sec. 709, yet where, in a controversy of a purely Federal character, the claim is made and denied that there was no evidence tending to show liability under the Federal law, such ruling, when duly excepted to, is reviewable, because inherently involving the operation and effect of the Federal law. *Kansas City Southern R. Co. vs. C. H. Albers Commission Co.*, 223 U. S., 573, 591, 56 L. ed., 556, 565, 32 Sup. Ct. Rep., 316; *Creswill vs. Grand Lodge, K. P.*, 225 U. S., 246, 56 L. ed., 1074, 32 Sup. Ct. Rep., 822. * * * * *

"It is to be observed, however, that even if, for the sake of argument, the broad expressions of the Court below and those of the trial Court be so limited as to justify the conception that it was only intended to decide that permitting the working beyond the statutory time was negligence *per se*, giving rise to liability only where the proof showed a casual connection between the injury complained of and such *per se* negligence, the concession would not avoid the Federal question or remove the error. We say this, because indulging in the assumption stated would render it necessary to determine, as previously pointed out, the Federal question whether there was any evidence tending to show a connection between the asserted negligence and the occurrence of the accident; that is, whether the plaintiff had offered any proof tending to show the existence of the Federal right which was asserted; or, conversely speaking, whether there was any proof tending to establish that the defendant was liable within the terms of the statute—considerations as the right, on the one part, of the plaintiff, or the immunity, on the other part, of the defendant, depending exclusively upon the statute, were, in the nature of things, both necessarily Federal, since they were, from the point of view of the statutes, correlative. Assuming then that, as the result of the hypothesis we have indulged in, the case is reducible to the Federal question last stated, we are clearly of the opinion that, as there

was no proof tending to show a connection between the permitting of the working beyond the statutory time, and the happening of the accident, reversible error was committed. Of course, the inquiry whether there was any proof having such tendency is not to be solved by indulging in mere surmise or conjecture, or by resorting to imaginary possibilities, for to so do would but resolve the question back to the generic rule of liability as insurer, which we have previously disposed of."

ERRONEOUS LEGAL CONCLUSIONS OF STATE COURT UPON FACTS FOUND.

While we do not admit for an instant that the undisputed testimony reasonably admitted of the inferences of fact set forth by the Supreme Court of South Carolina in its opinion, we submit that even upon the facts found by the Supreme Court of South Carolina, it erred as a matter of law in concluding: 1st. That the evidence justified the inference that plaintiff's intestate was employed in interstate commerce within the Act at the time of his death. 2nd. That there was evidence of negligence on the part of defendant towards plaintiff's intestate proximately causing his death, within the meaning of the Act, and, 3rd. That plaintiff's intestate did not assume the risks of the dangers causing his death, within the meaning of the Act. (See opinion, beginning at page 153.) These errors are saved for the consideration of this Court by the specific assignment of errors numbered 3 (p. 161), 6 (p. 162), and 7 (p. 162).

Even if this Court should depart from the principles announced in the very recent *McWhirter* case, *supra*, it must surely consider whether the Supreme Court of South Carolina erred in its conclusions of law upon the facts found by it, which conclusions specifically deny the three specific rights and immunities specially set up and claimed by defendant below under the Federal Act. To hold otherwise would be for this Court to renounce its jurisdiction in

practically every case under the Federal Employers' Liability Act. There can be no difference, as a legal proposition, in an erroneous application of the Federal Act to a state of admitted facts and a consequent denial of defendant's right to immunity from a judgment under such Act upon such admitted facts, and an erroneous construction and application of the terms of the Act itself. In other words, the success of the contention of the defendant in error on this motion would be a final renouncement of the jurisdiction of this Court in all cases under the Act and a relegation of them to a final decision by the Supreme Courts of the States.

2. That the ninth assignment of error (R. p. 163) does not present a Federal question.

Without unduly protracting this brief, we call attention to defendant's exception XII in the Supreme Court of South Carolina (R. p. 152), and assignments of error 8 and 9 in this Court (R. pp. 162-164). Referring to the practice in the Courts of South Carolina heretofore explained, and the manner in which this exception was taken for the Supreme Court of South Carolina, passed upon by that Court and saved for the consideration of this Court, we submit that *Seaboard Air Line Railway vs. Horton*, 223 U. S., 492, 58 L. ed., 1062, is entirely conclusive in answer to this point.

II.

THE MOTION TO AFFIRM.

In view of the considerations above noted, it can not be necessary to discuss the contention of the defendant in error that the Federal questions here presented are frivolous. On the contrary, it is so manifest that Federal questions are presented and that the rulings in respect to them below were erroneous, that if the rules and practice of this Court permitted, it would be to the interest of all concerned to disencumber the docket of this case by a reversal on this hearing, since if this can not be done, that result must

inevitably follow when the case is reached regularly on the merits.

If the Court should be in doubt upon this point we would respectfully ask its consideration to the briefest possible discussion of the elementary propositions involved.

IS THERE EVIDENCE THAT INTESTATE CAME TO HIS DEATH "WHILE EMPLOYED IN INTERSTATE COMMERCE" WITHIN THE ACT?

The Act applies only to "injuries occurring when the *particular service in which the employee is engaged* is a part of interstate commerce" (*Illinois Cent. Rd. Co. vs. Behrens*, 233 U. S., 473), or to injuries sustained "while the *employee is employed by the carrier* in such commerce." (*Pedersen vs. Rd. Co.*, 229 U. S., 150.) (Italics added.)

The Act does not apply except when the relation of master and servant exists. This relation exists only when the employee is "acting within the line of his duty as an employe;" while the employee is performing service for the master under the contract of employment. Since intestate was employed to inspect his engine at a designated time and at a place made safe for his work, he was not "employed" when he voluntarily undertook the performance of this work at a different time and at a different, unsafe and dangerous place—where, and because of, his deviation from his employment, he suffered the evil results of which his administratrix now complains. See 3 Elliott on Railroads, 2nd Edition, Section 1303; *Patten vs. T. & P. R. Co.*, 179 U. S., 658, 45 L. ed., 361.

This discussion assumes that intestate went into the roundhouse to inspect his engine—an assumption not only based upon the purest conjecture and speculation, but contrary to the only reasonable inference that he went into roundhouse to go to sleep upon another engine. The Supreme Court of South Carolina has itself previously said, in *Crosby vs. Ry.*, 81 S. C., 31:

> "As declared in *Taylor vs. Ry.*, 78 S. C., 556, a scintilla of evidence is any material evidence which, taken as true, would tend to establish the issue in the mind

of a reasonable juror. The law affords no redress for wrongs which exist wholly in the imagination. Verdicts can not be allowed to rest upon mere surmise, conjecture or caprice. The law is moved by material evidence, including proven facts and those presumptions which the law recognizes from motives of public policy and as founded in human experience. A Court fails to exercise its high prerogatives to administer justice according to law when it permits a verdict to stand which finds no support in evidence."

The minority opinion is clearly correct in concluding that there was no evidence justifying the inference that intestate went into the roundhouse in the performance of any duty of his employment, and then, beyond peradventure, he was not employed within the Act. *Benson vs. Lancashire & Yorkshire Railway Co.*, Law Reports, 1904, 1 King's Bench, 242; *Ellsworth vs. Metheny*, 104 Fed., 119, 44 C. C. A., 484; *Russell vs. Short Line Rd. Co.*, 155 Fed., 22, 83 C. C. A., 618; *St. Louis, S. R. Co. vs. Harvey*, 144 Fed., 806, 75 C. C. A., 536.

IS THERE EVIDENCE OF NEGLIGENCE PROXIMATELY RESULTING IN THE DEATH OF PLAINTIFF'S INTESTATE?

Assuming for a moment that the roundhouse was incomplete and that, as an abstract proposition, in order to protect the safety of employees whose duties required them to go into the roundhouse at night, the roundhouse should have been lighted and the drop pit covered or protected, this question must still be answered in the negative. The Supreme Court of South Carolina, even in its finding of fact, admits that intestate was not required to go into the roundhouse to inspect his engine at any time. The duties of engineers did not carry them into the roundhouse room at any time. The duties of hostlers and machinists carried them into the roundhouse at times, says the Supreme Court of South Carolina, and because of this, there was evidence of negligence on the part of defendant towards intestate,

an engineer, in failing to have the roundhouse lighted and the pit guarded.

The answer to such a conclusion is apparent. Defendant could not anticipate that intestate would undertake, voluntarily, to perform the duty of inspection at a different time and different place from that required by his duties. Defendant could not anticipate that intestate would go into the roundhouse at any time to perform any duty, and ordinary care did not, therefore, require defendant to make the roundhouse safe for him—consequently, defendant was under no duty to intestate in this particular. *Stone vs. Railroad Co.*, 96 S. C., 228, 238. Conversely, if the failure to have the roundhouse safe could be considered, as an abstract proposition, as negligence towards the hostlers and machinists, it was not the proximate cause of intestate's death, since intestate's entrance into the roundhouse and fall into the pit could not be considered a "result naturally and reasonably to be expected therefrom." "It was not the natural and probable consequence and could not have been foreseen in the light of the circumstances attending the negligence of the officers in charge of the" roundhouse. *Scheffer* (15 Otto), 105 U. S., 449, 26 L. ed., 1070; *Murphy vs. Rd. Co.*, 89 S. C., 15 at 23.

ASSUMPTION OF RISKS.

Intestate was a man of thirty-four years of age, in possession of good faculties, unusual intelligence and several years' experience as a railroad engineer. He had been running into the Cayce yards for several months while the roundhouse had been under construction and had made three trips in and out since the roundhouse had been in use. He had been into the roundhouse earlier on the very night he was killed. He had three torches on his engine (p. 53), but went in without using one. There is no suggestion that in going into the roundhouse he acted under even the request, much less the direction, of any representative of the master. His action in so doing was entirely voluntary. Under these undisputed facts, he assumed the

risks of the defects in the roundhouse, if any, under the principles announced by this Court in *S. A. L. Ry. vs. Horton, supra.* But, in addition to this, the trial Judge, in instructing the jury that the servant, under no circumstances, assumed the risks of any defects due to the negligence of the master, absolutely violated the rule announced in the *Horton* case, and it is for this Court to say what is the proper conclusion from the testimony and determine whether this admitted error was prejudicial to the immunity to which the defendant was entitled under the Federal Act.

CONCLUSION.

The manner in which plaintiff's intestate came to his death, and the cause thereof, is entirely speculative and conjectural. Plaintiff's theory of the case is not supported by a particle of competent testimony in the record. As said by this Court in the *Patten case, supra,* "If the employee is unable to adduce sufficient evidence to show negligence on the part of the employer, it is only one of the many cases in which the plaintiff fails in his testimony; and no mere sympathy for the unfortunate victim of an accident justifies any departure from any rules of proof resting upon the plaintiff."

III.

THE MOTION TO ADVANCE.

The statement appears in the brief by defendant in error that the purpose of the writ to this Court is only for delay. In refutation of this statement, we respectfully call the Court's attention to the record facts that the judgment of the Supreme Court of South Carolina was filed on November 18th, 1914 (R. p. 158); that the writ of error and incidental record was filed in the Supreme Court of South Carolina on November 28th, 1914, within the ten days allowed under Rule XX of the Supreme Court of South Carolina,

during which time the remittitur stays in that Court, and that the record was filed in this Court on November 30th, 1914, within twelve days from the rendition of the judgment of the Supreme Court of South Carolina. We also call attention to the fact that this record was immediately printed and filed in this Court before December 26th, 1914. So averse is plaintiff in error to any suggestion of delay on its part that it offers no objection to the advancement of the case to the summary docket, although it feels that the limit of time for oral argument on such docket will hamper its counsel in the proper presentation of the case.

Respectfully submitted,

J. B. S. LYLES,
Attorney for Plaintiff in Error.

FILED
FEB 17 1915
JAMES D. MAHER
CLERK

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1914.

No. 710

SEABOARD AIR LINE RAILWAY, PLAINTIFF IN ERROR,

vs.

CLARA V. PADGETT, Administratrix of the Estate of Lewis H. Padgett, Deceased, DEFENDANT IN ERROR.

ON WRIT OF ERROR TO THE SUPREME COURT OF SOUTH CAROLINA.

Brief for Plaintiff in Error on the Merits.

J. B. S. LYLES,
Attorney for Plaintiff in Error.

THE STATE CO., COLUMBIA, S. C.

INDEX

PAGE

Statement for Plaintiff in Error:
- Issues Raised by Pleadings 2
- Statement of Evidence 3

Manner in Which Issues Are Raised 10

Specification of Errors Relied Upon:
- Specification First: Direction of verdict under Federal Act should be determined by sufficient evidence and not by scintilla doctrine 11
- Specification Second: No evidence that intestate was employed in interstate commerce 12
- Specification Third: Facts found by Supreme Court of South Carolina do not allow conclusion that intestate was employed in interstate commerce 12
- Specification Fourth: No evidence of negligence. 13
- Specification Fifth: Facts found by Supreme Court of South Carolina do not permit conclusion of negligence 13
- Specification Sixth: Only inference was intestate assumed the risks 13
- Specification Seventh: Errors in charge on assumption of risks 13

Argument:
- Specification First 15
- Specification Second 20
- Specification Third 26
- Specifications Fourth and Fifth 26
- Specification Sixth 28
- Specification Seventh 30

Conclusion 31

TABLE OF CASES.

Benson *vs.* Lancashine & Yorkshire Ry. Co., 1 King's Bench, 242. (1904.) 22

Crosby *vs.* Ry., 81 S. C., 31 16

PAGE

Dent *vs.* Bryce, 16 S. C., 1 25
3 Elliott on Railroads, 2nd Ed., Sec. 1303 21
Ellis' Admr. *vs.* L. H. St. Ry. Co., 160 S. W., 512 28
Ellsworth *vs.* Metheney, 104 Fed., 119 26
Greene *vs.* Ry., 72 S. C., 398 32
Howell *vs.* A. C. L. Rd. Co., 99 S. C., 404 19
Illinois Cent. Rd. Co. *vs.* Behrens, 233 U. S., 473 20
Kennedy *vs.* Ry., 59 S. C., 535 28
Mondou *vs.* Ry., 223 U. S., 1 16
Murphy *vs.* Rd. Co., 89 S. C., 15 28
N. C. Ry. Co. *vs.* Zachary, 232 U. S., 248 17
Patton *vs.* T. & P. R. Co., 179 U. S., 658 15
Pedersen *vs.* Rd. Co., 229 U. S., 150 20
Russell *vs.* Short Line Rd. Co., 155 Fed., 22 26
Scheffer *vs.* Washington City, etc., Ry. Co., 105 U. S., 449 28
Seaboard Air Line Ry. *vs.* Horton, 223 U. S., 492 16
St. Louis, S. R. Co. *vs.* Harvey, 144 Fed., 806 26
St. Louis, I. M. & S. R. Co. *vs.* McWhirter, 229 U. S., 265 17
Stone *vs.* A. C. L. Rd. Co., 96 S. C., 228 27
Towles *vs.* Ry., 83 S. C., 504 25

IN THE SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1914.

No. 710

SEABOARD AIR LINE RAILWAY, PLAINTIFF IN ERROR,

vs.

CLARA V. PADGETT, Administratrix of the Estate of Lewis H. Padgett, Deceased, DEFENDANT IN ERROR.

ON WRIT OF ERROR TO THE SUPREME COURT OF SOUTH CAROLINA.

Brief for Plaintiff in Error on the Merits.

J. B. S. LYLES,
Attorney for Plaintiff in Error.

STATEMENT FOR PLAINTIFF IN ERROR.

The writ of error brings up a judgment of the Supreme Court of South Carolina, filed November 18th, 1914, affirming a judgment of the Court of Common Pleas for Lexington County, South Carolina, in the sum of $20,000 and costs entered on a verdict in favor of plaintiff below.

The suit was a civil action commenced on June 20th, 1913, by the plaintiff, Clara V. Padgett, administratrix of the estate of Lewis H. Padgett, deceased, for the benefit of herself and eight dependent children, against Seaboard Air Line Railway, defendant, under the Federal Employers' Liability Act of Congress, to recover damages for the death of said intestate, alleged to have been caused by the

negligence and wrongful acts of the defendant on January 12th, 1913, while said intestate was employed by defendant as a locomotive engineer in interstate service.

The references made are to the printed transcript of record.

ISSUES RAISED BY PLEADINGS.

The complaint alleged that the defendant was an interstate carrier engaged in the conduct of a general railroad business in and through the States of Virginia, North Carolina, South Carolina and Georgia, and that it owned and controlled a railroad yard composed of several tracks, roundhouse and other appurtenances at Cayce, in Lexington County, South Carolina (Complaint, paragraphs 2 and 3, R., p. 2). This was admitted by the answer (Answer, paragraphs 2 and 3, R., p. 5). The complaint further alleged that at the time of his death, plaintiff's intestate was discharging his duties as an interstate employee and was in the service of the defendant as a locomotive engineer, running between the city of Savannah, Georgia, and Cayce, Lexington County, South Carolina, and that on the night of his death, the said intestate, in the discharge of his duties as such locomotive engineer in interstate service, went into the roundhouse of the defendant in its Cayce yards and there met instant death by falling into a drop pit. (Complaint, paragraphs 3-7, R., pp. 2, 3.)

The answer admitted the death of intestate, but denied the allegations of fact to the effect that he was in the service of the defendant or discharging any duties incident to his employment when he went into the roundhouse and fell into the pit. (Answer, paragraphs 3-7, R., p. 5.) The answer further set up as a second defense that intestate did not go into the roundhouse in the performance of any duties as engineer for defendant, but, on the contrary, without even permission or license of defendant, and as a trespasser. (Second defense, R., pp. 5-6.)

The complaint further alleged that the death of intestate was caused by the negligence of the defendant, its officers, agents and employees, in allowing the roundhouse at Cayce to be used before completed and while in an unsafe and dangerous condition, and directing and permitting intestate to go to his engine, which was in the roundhouse standing over an open and unprotected pit, in the night-time, with no lights or other protection therein, and further in not relieving intestate from duty on the night he was killed, but on the other hand, holding him on duty and in suspense during the night. (Complaint, paragraphs 8, 9, R., pp. 3, 4.) The answer denied these allegations of negligence (Answer, paragraphs 8 and 9, p. 5.) The answer further set up, as a third defense, contributory negligence on the part of intestate, and as a fourth defense, assumption of risks on the part of intestate (R., p. 6). The complaint specifically alleged that the action was brought under an Act of Congress, passed April 22, 1908, and amendments thereto, known as the Federal Employers' Liability Act (Complaint, paragraph 5, p. 3).

STATEMENT OF EVIDENCE.

An understanding of the undisputed testimony, together with all reasonable inferences to be drawn therefrom, will, in our opinion, largely conclude the questions now before the Court, and we undertake to give such a statement as follows:

The roundhouse of defendant in its Cayce yards, was built to house engines temporarily, and was put into service on January 5th, 1913, just one week before intestate's death. The roundhouse is semicircular in shape and contains ten tracks, which converge at its entrance so as to allow engines to be run into it upon any one of these tracks, from a single track turntable, located immediately in front of the roundhouse, to the south, in which direction the roundhouse opens. Between and under the rails of

each of these tracks is a pit some four feet in depth, running the entire length of each track in the roundhouse, so that machinists can go underneath the engines on such tracks for the purpose of repairing them. In addition to the pits beneath and under each of these tracks, there is another pit some seven feet in width and ten feet ten inches in depth, which runs between tracks two and three, at right angles to them. This is a drop pit, so-called because used for the purpose of dropping driving wheels off of an engine on one of these tracks and transferring the wheels to the other track upon which they are taken out. This is the pit in which intestate was found dead on the morning of January 12th, 1913. (Witness Cline, pp. 7-8; Chisolm, pp. 17-18; Garrett, pp. 55-56, 58-60, 65-66.)

Plaintiff contended that the roundhouse was incomplete because the drop pit had not been covered and no lights had been installed in the roundhouse. Defendant contended that the roundhouse was complete. There is no evidence in the record that the pit was subsequently covered or lights subsequently installed in the roundhouse. The trial Judge overruled the efforts of plaintiff's attorneys to introduce such evidence. (Cline, p. 9; Chisolm, p. 18; Horsford, p. 48; Hooper, p. 65; Garrett, pp. 66-71.)

The evidence was undisputed that no lights were installed in the roundhouse and the pit was uncovered at the time of intestate's death. (Cline, pp. 8, 14-15; Wallace, p. 25; Riggs, p. 30; Horsford, p. 48; Hooper, pp. 64-65.) The evidence was, however, that the roundhouse and pit were completed according to specifications. (Garrett, pp. 66-71.)

Intestate had been in the service of defendant as a freight engineer for a number of years. He had been promoted to his passenger run on the same day that the roundhouse was put in service. His run was local passenger No. 59, from Cayce to Savannah, scheduled to leave Cayce at 6:10 a. m., Central time, and the corresponding train, No. 62, from Savannah to Cayce, scheduled to arrive at Cayce at 8:50 p. m., Central time. He went down one day

and back the next. He had made three trips into the Cayce yards on this run since the roundhouse had been in use, and had, of course, made numerous trips as a freight engineer during the construction of the roundhouse. On the day in question he left his home in Savannah at 3 p. m.

Under the agreement between the engineers, including the plaintiff, and the defendant company, effective at the time of intestate's death, and containing the rules and regulations specifying the duties and work of engineers, hostlers and machinists were provided at the Cayce yards to take entire charge of engines brought into the Cayce yards by engineers, and make such engines ready to go out upon their runs (Rule 24, R., p. 136). The Cayce yards were a part of the Columbia terminals (two miles distant) and this rule applied there (R., p. 80). Rule 27 provided: "27. Engineers will not be held responsible for engine after being relieved from duty." Rule 23 provided: "23. Engineers will be required to take charge of their engines thirty minutes in advance of leaving time of train for which they are called." (R., p. 136.) In construing these rules, the trial Judge very properly charged the defendant's requests 18, 19 and 20, as follows:

"18. Under Rule 21 of the contract between the engineers and the company, no engineer could call any engine 'his engine.' The engines belonged to the company, and it could furnish any engine for any run." I charge you that.

"19. Rule 27 is clear that engineers are not responsible for, or under any duty connected with his engine after he is relieved from duty." I charge you that.

"20. Under Rule 23, an engineer has no duty to perform in connection with his engine before thirty minutes in advance of the leaving time of the train for which he is called." I charge you that.

(R., p. 147.)

Any apparent inconsistency among the witnesses as to the time given in their testimony is probably caused by the fact that the time changes at Cayce, Central time prevailing from Cayce to the south, and Eastern time prevailing

from Cayce to the north. The time given in the schedule, at page 137 of the record, is Central time.

On the night of January 11th, intestate came into Cayce on No. 59 at 8:50 p. m., Central time, or 9:50, Eastern time. He was required to bring his train on through the Cayce yards to the Columbia terminal, where the train was cut off, and then intestate ran his engine back to the Cayce yards. Upon arriving at the Cayce yards, his duties required him to place his engine in one of the several side-tracks, used for the purpose of accommodating engines brought in by engineers from their runs and engines placed by hostlers to be taken off by engineers going out on their runs. These tracks were located in the vicinity of the yard office and between the yard office and the roundhouse. They were distinct and separate from the roundhouse, that is, they were not in the roundhouse. These tracks were a part of the yards, although engines left thereon were frequently taken into the roundhouse by hostlers by way of the turntable, when it was proper so to do. The engineers never took the engines into the roundhouse and never brought engines out of the roundhouse. They left the engines on these tracks when they came in from their runs, and they received and inspected their engines on these tracks before they went out on their runs. Intestate had his choice as to which of these tracks he would choose to leave his engine on, the only requirement being that he clear the main line. (Riggs, pp. 29, 32, 38-41; Horsford, pp. 50-51.)

Intestate did in fact stop his engine just clear of the yard master's office, which was about one thousand feet north of the roundhouse, some time before 10:30 p. m., Central time. This was after he had brought his engine back from the Columbia terminal to the Cayce yards. Intestate was then required to make an inspection of his engine at this place, and at this time, and to make out a work report if anything was necessary to be done to the engine before it went out upon its next run. He was then required to go, and actually went, into the machine

shop where the book was kept upon which engineers registered off. This machine shop was in the same general building and under the same roof as the roundhouse, but it was a separate and distinct room from the roundhouse, separated therefrom by a cement partition. To go into this machine shop from the tracks up towards the yard master's office, where engineers left and received their engines, and where Padgett had actually left his engine, it was neither necessary nor convenient to go into that room or portion of this building designated as the roundhouse, and wherein the pit in question was located. The machine shop was a room north of the roundhouse and between the roundhouse and the tracks on which the engines were left, and to go into the machine shop from such tracks, ingress and egress were had by a door on the north side of the machine shop room, that is, the opposite side from the roundhouse room, making it neither necessary nor convenient to pass through the roundhouse, which was to the south of the machine shop. The act of registering on and off was the only duty which carried engineers even within the vicinity of the roundhouse building, and at the time of Padgett's death the registry book was in the machine shop, and the proper mode of ingress and egress to this room and the registry book would not carry engineers even within the room known as the roundhouse, wherein the drop pit was located. (Garrett, pp. 56-57, 72-73; Purvis, pp. 79-90; Radford, pp. 91-95, 98-103; Freeman, pp. 103-108, 110-112, 115-118; Beville, pp. 120-122, 124-126.)

After leaving his engine, No. 35, on the track near the yard master's office, intestate went to the machine shop where he registered off in his own handwriting as follows: "Date Jan. 11/ Section ——/ Train 62/ Engine 35/ Relieved 10:30 p. m./ Engineer Padgett/ Fireman McDonald/ No. of hours off duty before beginning this trip—/ No. of hours on duty making this trip —/ Remarks. Rest Claimed, New Address, Leave of Absence, Etc.—" It is presumed that Padgett inspected his engine before leaving

it at the yard master's office, and if he had found any work to be done upon it, it was his duty to have made out a work report at the engine and then filed it in a box provided for this purpose at the same place that the registry book was located, that is, in the machine shop. It does not appear that any work report was so made out by Padgett at this time or at the conclusion of this trip up on train No. 62. The statement of the defendant in error to this effect is entirely incorrect. (Lindler, pp. 131-132.)

This concluded Padgett's duties and he had no further duties to perform until after being called one hour and fifteen minutes before the departure of train No. 59 on the morning of the 12th, scheduled to leave at 6:10 a. m., Central time (p. 137), and then he would be required to take charge of his engine on one of the tracks up near the yard master's office at 5:40 a. m., Central time (Rules 22, 23, p. 136).

Plaintiff attempted to establish that Padgett was instructed to hold himself ready to go back to Savannah on train No. 43, scheduled to leave at 11:49 p. m., on the 11th, Central time (pp. 44-45), but this witness admitted that before train No. 43 left, Padgett knew that he would not be required to go out on this train, but would await his regular run (pp. 49-50). Purvis, Superintendent, stated that he never contemplated using Padgett as engineer on No. 43; that he did contemplate using Padgett's engine, No. 35, but that this idea was changed before No. 43 left, and Padgett was so informed (p. 78).

The witnesses agreed that Padgett was in Cayce after having registered off at 10:30 p. m., Central time, and that he remained talking to Engineer Radford until about 12:30 a. m., Central time, when Radford backed his engine out to take No. 43 (p. 91, 92). He then went over to a hotel run by an outsider, Darden, with Engineer Freeman (pp. 106, 107). He was then seen by the witness, Cline, about 1:30, going toward the roundhouse (p. 10). When the engine that went north on train No. 66, scheduled to leave about 4:25 a. m., on the 12th, Central time, was taken

out of the roundhouse, Padgett was found asleep on his engine (p. 137). The witnesses place this at about 4 o'clock in the morning, evidently speaking of Eastern time, which would make it 3 o'clock, Central time. Plaintiff then endeavored to establish by this hostler's crew that Padgett, having ridden out to the coal chute on this engine, made inquiry as to where his engine was, was informed that it was on track No. 3 in the roundhouse, and that Padgett went back to the roundhouse for the purpose of seeing if the boxes had been packed. The trial Judge, however, struck out all such testimony, and the only evidence in the record is that Padgett was seen going back to the roundhouse about 4 o'clock, Eastern time, or 3 o'clock, Central time. (Cline, p. 13; Riggs, pp. 31-33; See pp. 34-37; Horsford, pp. 43-46.)

Padgett's engine was never placed in the roundhouse during the night of the 11th and 12th. On the engineer's registry book, Padgett's engine was registered as No. 35 after this trip. On a stub of the time slips, which was produced from plaintiff's possession, and on the stub of which, covering this trip, erasures had been made, which have never been explained by plaintiff, his engine was given as No. 67. If written by Padgett this stub was evidently written during his trip up to Cayce. The witnesses, Cline, Wallace, Riggs and Horsford, attempted to testify that Padgett's engine was in the roundhouse, but they each admitted that they did not know whether it was 35 or 67 (pp. 13-14; 24-25, 26-27; 30-33; 35, 46, 47, 52). Freeman testified that he brought in engine 67 on the night of the 11th from Savannah (pp. 103-104). Beville testified that Padgett had been running engine 67 before the night of the 11th, but that Padgett came in on No. 35 on the night of the 11th, and Beville took out engine No. 67 on the morning of the 12th (pp. 119, 120). Aldridge testified that Padgett came in on engine No. 35 and that this engine was to go out on train No. 59 the next morning; that he had charge of this engine when it came in and placed it ready for going out, and that the engine was never in the roundhouse

(pp. 127, 128). Padgett was never located by the call boy when the call boy went out about 5:45 a. m., Eastern time, to find him to go out on train No. 59 at 6:10 a. m., Central time (p. 26), and he was later found dead in the pit.

MANNER IN WHICH ISSUES ARE RAISED.

When the testimony was concluded, plaintiff in error (defendant below) moved for a directed verdict upon the grounds:

1. That there was no evidence that intestate was employed in interstate commerce within the Federal Act when he came to his death.

2. That there was no evidence of negligence on defendant's part causing or contributing to intestate's death within the Federal Act.

3. That upon the entire evidence, intestate assumed the risks within the Federal Act.

This motion was refused, the trial Judge ruling: "Gentlemen, we have been taking testimony in this case for two days. Now, if there is any testimony whatever in that record, it has got to go to the jury. You know a scintilla of testimony is a very minute piece of testimony, and I will say there is a scintilla somewhere in that record, and I am going to overrule the motion and let the jury decide the case." (R., pp. 137, 138.)

A reference to exceptions II, III, IV, V and XI, pp. 149-152 of the record, will show that the rulings of the trial Court upon the grounds advanced for the direction of a verdict in favor of the defendant were properly saved for consideration by the Supreme Court. The rulings of the Supreme Court of South Carolina upon this question are particularly assigned as error for the consideration of this Court by assignments of error 1, 4 and 7 (R., pp. 160, 161, 162).

A motion for a new trial upon the minutes was duly made and in it the three legal grounds upon which the mo-

tion for a directed verdict were predicated were duly presented and overruled by the trial court. (See grounds 1, 2, 3, 4 and 5, R., pp. 147, 148. The defendant's requests referred to in such grounds are found in the trial Judge's charge, beginning at the bottom of page 143 of the Record.) These rulings of the trial court were saved for the consideration of the Supreme Court of South Carolina by exceptions VI, VII, VIII, IX and X (R., pp. 150, 151); and the rulings of the latter court are brought here by assignments of error numbered 2 and 5. (R., pp. 160-161.)

In submitting the case to the jury the trial Judge, at plaintiff's request, charged that the servant did not assume the risks of the master's negligence under any circumstances and then, at defendant's request, charged the true rule from *Seaboard Air Line Railway vs. Horton.* See plaintiff's requests charged, numbered 6 and 11 (R., pp. 141, 142), and defendant's request charged, numbered 8½ (R., p. 145). This was excepted to in the Supreme Court of South Carolina (Exception XII, p. 152) and brought here by assignments numbered 8 and 9, pp. 162-164.

SPECIFICATION OF ERRORS RELIED UPON.

SPECIFICATION FIRST.

That the question of directing a verdict should have been determined by the uniform test of sufficient evidence prevailing in the Federal courts and not by the peculiar, local test of *scintilla* of evidence prevailing in South Carolina.

AUTHORITIES CITED.

Crosby vs. Ry., 81 S. C., 31.
Howell vs. A. C. L. Rd. Co., 99 S. C., 404.
Mondou vs. Ry., 223 U. S., 1.
N. C. R. R. Co. vs. Zachary, 232 U. S., 492.
Patton vs. T. & P. R. Co., 179 U. S., 658.
Randall vs. B. & O. R. Co., 109, U. S., 478.

S. A. L. Ry. vs. Horton, 223 U. S., 492.
St. Louis, I. M. & S. R. Co. vs. McWhirter, 229 U. S., 265.

SPECIFICATION SECOND.

That the Supreme Court of South Carolina erred in ruling upon the entire evidence that there was evidence to justify the submission to the jury of the issue whether intestate was employed in interstate commerce when he came to his death. Assignments of error numbered 1 and 2 (R., pp. 160-161).

AUTHORITIES CITED.

Benson vs. Lancashire & Yorkshire Ry. Co., 1 King's Bench, 242. (1904)
3 Elliott on Railroads, 2nd Edition, Sec. 1303.
Dent vs. Bryce, 16 S. C., 1.
Illinois Central Rd. Co. vs. Behrens, 233 U. S., 473.
Pedersen vs. Rd. Co., 229 U. S., 150.
Towles vs. Ry., 83 S. C., 504.

SPECIFICATION THIRD.

That the Supreme Court of South Carolina erred in concluding, as a proposition of law, upon the facts as found by such Court, that there was evidence justifying the submission to the jury of the issue whether intestate was employed in interstate commerce when he came to his death. Assignment of error, numbered 3. (R., p. 161.)

AUTHORITIES CITED.

Ellsworth vs. Metheney, 104 Fed., 119.
Patton vs. T. & P. R. Co., 179 U. S., 658.
Russell vs. Oregon Short Line Rd. Co., 155 Fed., 22.
St. Louis, S. W. Ry. vs. Harvey, 144 Fed., 806.

SPECIFICATION FOURTH.

That the Supreme Court of South Carolina erred in ruling, upon the entire case, that there was evidence to justify the submission to the jury of the issue whether defendant below had been guilty of negligence towards intestate, proximately causing or contributing to intestate's death. Assignments of error, numbered 4 and 5 (R., pp. 161-162).

AUTHORITIES CITED.

Ellis, Admr., vs. L. H. St. Ry. Co., 160 S. W., 512.
Kennedy vs. Ry., 59 S. C., 535.
Murphy vs. Rd. Co., 89 S. C., 15.
Scheffer vs. Washington City, etc., Rd. Co., 105 U. S., 449.
Stone vs. Ry., 96 S. C., 228.

SPECIFICATION FIFTH.

That the Supreme Court of South Carolina erred in concluding as a proposition of law, upon the facts found by it, that there was evidence justifying the submission to the jury of the issue whether defendant was guilty of negligence proximately causing or contributing to intestate's death. Assignment of error, numbered 6 (R., p. 162).

SPECIFICATION SIXTH.

That the Supreme Court of South Carolina erred in holding that the entire evidence admitted of any inference except that intestate assumed the risks. Assignment of error, numbered 7 (R., p. 162).

AUTHORITIES CITED.

S. A. L. Ry. vs. Horton, 223 U. S., 492.

SPECIFICATION SEVENTH.

Error in affirming the charge of plaintiff's requests numbered 6 and 11, as follows:

"'6. The servant by virtue of his employment assumes all the ordinary risks and hazards of his employment, and as this case is governed by the Federal Employers' Liability Act, which relates to common carriers or railroads engaged in interstate commerce, the servant does not assume the risks or hazards incident to the negligence of any of the officers, agents or employees of any such common carrier.' I charge you that. That covers what I said here while ago. Under the general law he assumed all the risks, but this is not so under this Federal Act; he merely assumes the risks incident to his employment, except as to that." (R., p. 141.)

"'11. In a case where the relationship of master and servant exists, the servant owes certain duties to the master and the master owes certain duties to the servant. The servant assumes all of the ordinary risks incident to his employment, but he does not assume any extraordinary risks incident to such employment. He does not assume the risks arising from the negligence of the master. The master is required under the law to furnish the servant a reasonably safe place, instrumentalities, machinery, tools, and the like, with which, in which, and by which he is to perform his duties as a servant. If the master fails to do this and injury results as the direct and proximate cause of such failure the master would be liable in damages to the servant so injured.' I charge you that, in connection with what I have said about the assumption of risks." (R., p. 142).

and error in holding such instructions to be not prejudicial to defendant because, as held, there was no evidence to justify the inference that intestate knew of any defects due to defendant's negligence.

And error in holding that such requests were not inconsistent with defendant's request charged, numbered 8½, as follows:

"'8½. If Padgett, before the injury, had knowledge of the alleged defects in the roundhouse, or, if having a reasonable opportunity to inform himself, he ought to have known of such defects, he is presumed, by remaining in the company's service, to have assumed

> the risks if he voluntarily exposed himself to the dangers of such defects, and his beneficiaries cannot recover for his injury or death resulting therefrom, and his knowledge has the same effect whether the defendant was informed or ignorant of such defects. This rule applies with special force if the defects or dangers were obvious to the senses.' I charge you that." (R., p. 145.)

or that such inconsistency was not prejudicial to defendant. Assignments of error, numbered 8 and 9. (R., pp. 162-164).

ARGUMENT.

SPECIFICATION FIRST.

It is the settled law in this Court that the trial Judge must direct a verdict for defendant unless the evidence produced by plaintiff is sufficient to warrant a recovery in his behalf. *Randall vs. B. & O. R. Co.*, 109 U. S., 478, 27 L. ed., 1003; *Patton vs. T. & P. R. Co.*, 179 U. S., 658, 45 L. ed., 361. Under the South Carolina law, the trial court can direct a verdict only when there is not a *scintilla* of evidence. If there is a *scintilla* in favor of plaintiff, the case must go to the jury, even though the evidence "is of such conclusive character that the court, in the exercise of a sound judicial discretion, would be compelled to set aside a verdict returned in opposition to it." (Quoting from the Patton case, 179 U. S., 659.) This rule is recognized by Rule LXXVII of the Circuit Courts of South Carolina, as follows:

> "Objections for Want of Evidence—Remedies.—The point that there is no evidence to support an alleged cause of action shall be first made either by a motion for nonsuit or a motion to direct the verdict, and the point that there is no evidence to support a defense shall be first made by motion to direct a verdict." Code of Laws of South Carolina, 1912, Volume II, p. 756;

and by Rule XXVII of the Supreme Court of South Carolina, as follows:

> "Reversal for Lack or Failure of Evidence.—Whenever an appeal to this Court is sustained on the ground that a nonsuit should have been granted or a verdict directed because of a total failure of evidence or because the evidence could admit of but one inference, the reversal of the judgment shall have the same effect as if the nonsuit had been ordered, or a verdict returned under the direction of the Circuit Judge: *Provided*, That this rule shall not be applicable when the cause of action was not barred by the statute of limitations, at the time said orders were referred on circuit, but would be barred at the time they were reversed by the Supreme Court." Code of Laws of South Carolina, Volume II, p. 731.

In *Crosby vs. Ry.*, 81 S. C., 31, it is said, "a *scintilla* of evidence is any material evidence which, taken as true, would tend to establish the issue in the mind of a reasonable juror."

The purpose of the Federal Act was to establish a uniform rule of liability covering common carriers and their employees while engaged in interstate commerce—such Act superseding the varying rules and regulations effective in the various States through which such commerce may be accomplished. The constitutionality of the Act was upheld upon the ground that "It undoubtedly rested with Congress to determine whether a national law, operating uniformly in all the States, upon all carriers by railroad engaged in interstate commerce, would better subserve the needs of that commerce.

". . . And now that Congress has acted, the laws of the States, in so far as they cover the same field, are superseded, for necessarily that which is not supreme must yield to that which is." Mondou case, 223 U. S., 1; 56 L. ed., 327. See also *Seaboard Air Line Ry. vs. Horton*, 223 U. S., 492, 58 L. ed., 1062.

This Court has ruled that under Section 237 of the Judicial Code, Rev. Stat., Sec. 709, it has jurisdiction to

analyze the evidence "to the extent necessary to give to plaintiff the benefit of its asserted Federal right." *North Carolina R. R. Co. vs. Zachary*, 232 U. S., 248.

In *St. Louis, I. M. & S. R. Co. vs. McWhirter*, 229 U. S., 265, 57 L. ed., 1179, this Court said:

> "And, of course, as the cause of action alleged was exclusively placed on the Federal statute, and the defense, therefore, alone involved determining *whether there was liability under the statute*, the mere statement of the case involved the Federal right and necessarily required, from a general point of view, its determination. . . . This is true since the finding that there was some evidence to go to the jury on the subject of negligence independently considered was necessarily a ruling against the binding instruction asked at the close of the testimony, upon the assumption that *there was nothing adequate to go to the jury to show liability under the Federal law.* While it is true, as we have said, that, coming from a State Court, the power to review is controlled by Rev. Stat., Sec. 709, yet where, in a controversy of a purely Federal character, *the claim is made and denied that there was no evidence tending to show liability under the Federal law*, such rulings, when duly excepted to, is reviewable, because inherently involving the operation and effect of the Federal law. . . . We say this, because indulging in the assumption stated would render it necessary to determine, as previously pointed out, the Federal question whether there was any evidence tending to show a connection between the asserted negligence and the occurrence of the accident; that is, whether the plaintiff had offered any proof tending to show the existence of the Federal right which was asserted; or, conversely speaking, whether there was any proof tending to establish that the defendant was liable within the terms of the statute—considerations as the right, on the one part, of the plaintiff, or the immunity, on the other part, of the defendant, depending exclusively upon the statute, where, in the nature of things, both necessarily Federal, since they were, from the point of view of the statutes, correlative. Assuming then that, as the result of the hypothesis we have indulged in,

> the case is reducible to the Federal question last stated, we are clearly of the opinion that, as there was no proof tending to show a connection between the permitting of the working beyond the statutory time, and the happening of the accident, reversible error was committed. *Of course, the inquiry whether there was any proof having such tendency is not to be solved by indulging in mere surmise or conjecture, or by resorting to imaginary possibilities*, for to do so would but resolve the question back to the generic rule of liability as insurer, which we have previously disposed of." (Italics added.)

This reasoning is pertinent to the determination by this Court of the Federal questions: Is there evidence that intestate was employed in interstate commerce within the Act? Is there evidence of negligence within the Act? Did the evidence conclusively show that intestate assumed the risks? Because all three must be determined before this Court can say whether defendant below was deprived of a right or immunity, in this case, under the Federal Statute.

What rule or test will this Court follow? The plaintiff in error engages and employs men in interstate commerce in Virginia, North and South Carolina, Georgia, Florida, and Alabama. Is this Court to say that upon a certain state of testimony it is liable under the Federal Act in South Caroliaa, because that State has the *scintilla* doctrine, but that it is not liable in Virginia, upon the identical state of testimony, because that State has the sufficient evidence doctrine? The question of the existence of evidence on these points is the question of the right and immunity of the carrier under the Act. If this question is to fluctuate according to the varying rules of the various States, the liability of the carrier fluctuates according to the State in which it is operating, and the desired uniformity in interstate commerce, which is the sole justification of the Act, disappears.

It is submitted that this Court, seeking uniformity, must adopt the sufficient evidence test, as announced in its

decisions, because this is the only one that prevails uniformly throughout the States of the country.

This question was presented to the Supreme Court of South Carolina in *Howell vs. A. C. L. Rd. Co.*, 99 S. C., 404 (A. S. No. 4). The question there presented was whether the State Court should follow the *scintilla* doctrine prevailing in this State or the sufficient evidence doctrine uniformly prevailing in the federal jurisdiction, in determining whether the evidence conclusively established that plaintiff was engaged in interstate commerce, on a motion to direct a verdict. It is to be noticed that the Court in this case, in declaring what is the rule in South Carolina, gives a much broader construction than that upon which the issue was decided in the case at bar, and is, so far as the writer knows, the broadest statement of the power of the Court to be found in the decisions of this State, but upon the question decided, the case is essentially wrong for four reasons:

1. Article V, Section 26, of the Constitution of South Carolina, 1895, provides: "Charge to Juries. Judges shall not charge juries in respect to matters of fact, but shall declare the law." This provision does not forbid the Judge from determining a legal question, and the question in such a situation is whether there is any or sufficient evidence to go to the jury, which is the legal question, and the inquiry is what test shall be followed by the Court in determining this legal question. There is nothing in this constitutional provision which forbids the adoption of the sufficient evidence rule in this State. Our Judges have the right to grant a new trial upon the ground that the verdict is against the preponderance of the testimony, and in granting such a motion, they no more charge the jury with respect to matters of fact than they would if they directed a verdict upon the ground that the evidence was not sufficient.

2. The constitutional provision cited must yield to the federal act within the sphere covered by the latter, and if the federal act, seeking uniformity, requires the adoption

of the sufficient evidence rule in cases tried under it, then the constitutional provision does not apply.

3. The inconvenience or hardship that may result to the Court in applying different rules caused by the injection of the federal act may be unfortunate, but in no wise excuses the Court from performing its definite duty in this particular. The discussion by this Court in the *Mondou* case, 223 U. S. 1, beginning at 55, 56 L. ed. 327, beginning at 348, is a complete answer to this suggestion.

4. The question is not one of procedure in the sense that the procedure of the forum governs the enforcement of the right. The Court says: "As the applicability of the statute is the question at issue, which horn of the dilemma must the Court take?" The determination of the applicability of the statute involves the determination of the right of plaintiff to recover under the statute, as well as the privilege or immunity of the defendant to avoid liability under the statute, which brings us back to the proposition already argued that unless the same test be followed in all Courts to determine this question, then the uniformity of liability sought to be created by the Federal Act will be entirely vitiated.

SPECIFICATION SECOND.

The Act applies only to "injuries occurring when the *particular service in which the employee is engaged* is a part of interstate commerce" (*Illinois Cent. Rd. Co. vs. Behrens*, 233 U. S., 473), or to injuries sustained "while the *employee is employed by the carrier* in such commerce." (*Pedersen vs. Rd. Co.*, 229 U. S., 150.) (Italics added.)

The Act does not apply except when the relation of master and servant exists. This relation exists only when the employee is "acting within the line of his duty as an employee"; while the employee is performing service for the master under the contract of employment. Since intestate was employed to inspect his engine at a designated time and at a place made safe for his work, he was not "employed" when he voluntarily undertook the performance

of this work at a different time and at a different, unsafe and dangerous place—where, and because of, his deviation from his employment, he suffered the evil results of which his administratrix now complains.

The question made here by the pleadings is purely the one whether plaintiff was employed at the time he went into the roundhouse. If he was not employed at all at that time, then he was not employed in interstate commerce. This question is thoroughly discussed by two authorities to which we respectfully refer the Court as conclusive.

3 Elliott on Railroads, 2nd Edition, Section 1303:

"1303. Performing Work Outside of Scope of the Contract of Employment.—Permissive Privilege.—In order to make a party liable in the capacity of an employer for injuries resulting from negligence the plaintiff must affirmatively prove that at the time of the injury he was acting within the line of his duty as an employe. If the time when and place where the injury is received are not within the scope of the contract of employment the relation of master and servant cannot be justly said to exist, and no recovery can be had against a defendant in the character or capacity of a master or employer. We do not say that where there is negligence on one side and freedom from negligence on the other there may not be a recovery if legal grounds for a recovery exist, but we do say that even though there may be negligence on the one side and none on the other there can in no event be a recovery upon the theory that there was a breach of the specific duty which an employer owes to the employe unless it is affirmatively shown that the injury was received while the plaintiff was performing service for the master under the contract of employment. That there is a breach of some duty does not warrant a finding against a party in the capacity of an employer. Where one employed to do a designated kind of work or to work at a particular place voluntarily undertakes to do some other work or goes to a place different from that assigned him by the contract of employment he cannot successfully insist that he is within the protection of

the rule that the master must exercise ordinary care to protect him against injury. The fact that the plaintiff is at some times and some places the employe of a railroad company does not entitle him to hold the company liable in the capacity of an employer when he goes into a place to which the duties of his service do not require him to go. If he goes into a place on the master's premises when he has no duty whatever at such a place he enjoys a mere permissive privilege and, at best, is a mere licensee, and if there be any liability to him it is only for a breach of the duty which an owner of premises owes to a licensee. Upon the principle that an employer is not liable to an employe who voluntarily does work outside of the duties of the service required of him by his contract of service it is held that there is no liability to an employe who works with a machine which he was not required to use, or uses a machine for a purpose for which it was not intended by the employer. If the employe is, at the time of the injury, reasonably within the line of his duty he is within the rule that the employer is bound to exercise ordinary care to prevent injury to him because of defects in the working place of appliances, but he cannot be justly said to be within the line of his duty when he is doing an act solely for his own convenience. Some of the cases rest the rule that the master is not liable for injuries to a servant where the servant voluntarily goes into a place of danger into which his contract of service does not require him to go, upon the ground of contributory negligence, but it seems to us that the rule rests upon the principle that the master's specific duty does not embrace places into which the employe goes solely for his own convenience."

Benson vs. Lancashire and Yorkshire Ry. Co., Law Reports, 1904, 1 King's Bench, p. 242. The question raised in the case is whether an engineer had suffered injuries arising out of and in the course of his employment within the meaning of the Workmen's Compensation Act of 1897. It will thus be seen that the question in the case was whether the engineer was employed at the time of the injuries. The facts are rather lengthy, but as the decision

is strongly relied upon by us, we give them somewhat at length:

> "The deceased man had been employed by the respondents, the Lancashire and Yorkshire Railway Company, as an engine driver. He had, in order to commence his day's work, to go to an engine shed of the respondents, where his engine was, at 7:45 a. m., and to 'sign on' there. He lived in a road called Rigby Road, between a quarter of a mile and half a mile from the engine shed, and his proper way there was to go along that road to a gate which gave access to the railway, and on getting through that gate to proceed along a pathway to the left by the side of the line, which led to the engine shed without crossing over the rails. It appears that, previously to the date of the accident, some complaint had been made against him on account of a train driven by him having been late, and he had been called upon to make a report with regard to the matter. On the morning of the day on which the accident happened, he started from his home in Rigby Road at about 6 a. m., and proceeded to the before-mentioned gate. On getting through the gate, instead of turning to the left and going to the engine shed, he went in the opposite direction along the railway to a signal-box, which stood in the middle of the line with sets of rails on both sides of it, for the purpose of making inquiry of the signalman as to the precise time when the train driven by him, in respect of which the complaint was made against him, had passed the signal-box. It appeared that the signalman did frequently in such cases give information to engine drivers in order to oblige them, but that it was no part of their duty to do so. Having obtained the information which he required, the deceased man left the signal-box, and proceeded along the railway towards the engine shed. Rather more than an hour later he was found on the line seriously injured, having apparently been run down by a pilot engine which had passed in the meantime, and he subsequently died from his injuries. The spot where he was found was about two-thirds of the distance from the signal box to the engine shed."

The Court said:

"It seems to me, with regard to a person who is employed for a certain period, either of the day or night, that, during the period that he is so employed he is entitled to the privileges given by the Act; but, from the time when he leaves off work, say, in the evening, until he arrives at the spot where his employment is to commence again next morning, he is in the same position, as regards his employer, as any other member of the public, and is not within the protection of the Act. If he chooses to take a dangerous route to that spot, he takes it at his own risk. On the facts of this case, it appears to me clear that the place where the deceased's employment was to commence on the day in question was the engine shed, and that he had to get there, before his daily employment could be resumed. If he chose to go there by a dangerous route, instead of by the ordinary route, he did so at his own risk, and he had not entered upon his employment again until he got there. The judge has found, in effect, that, for his own purposes, the deceased went out of his way, and put himself in jeopardy, by going across the rails, instead of going by the safe route, to the shed, and but for that the accident would not have happened. One would have thought that on that finding the case would have been concluded in favor of the employers, but the learned judge goes on to give reasons for coming to the contrary conclusion. The fallacy which underlies his reasoning in what he subsequently said appears to me to be that it implies that the deceased's employment began when he left the signal-box. But he clearly had not gone there for the purpose or at the risk of his employers. If he had no business, so far as they were concerned, to go to the signal-box, it cannot be said, in my opinion, that his employment began, and that he was going to the shed at his employer's risk, when he left it. He had not entered on his employment, merely because he had got upon his employers' premises. A railway extends a long way, and a workman employed by the company does not enter upon his employment at any place where on any given morning he chooses to enter on their premises with a view of subsequently going to his work. The place where the deceased had to enter on his employment was the engine shed. It is not neces-

sary for the purposes of the present case to define precisely what is the extent of the area which might be included in the term 'engine shed;' for it certainly did not extend to the signal-box or to the spot where the deceased was found. It appears to me that the learned county court judge clearly misdirected himself in point of law in treating the deceased's employment as beginning directly he left the signal-box. There is nothing to show that it began before he reached the place where he had to report himself for work that morning, namely, the engine shed. For these reasons I think the appeal must be allowed."

We submit that under this rule there was no evidence to establish that intestate went into the roundhouse to discharge any duty of his employment and this, though the test of sufficient evidence of that of *scintilla* be employed. The trial Judge properly construed written rules 23 and 27 (R., p. 136) at defendant's request by charging (R., p. 147):

"'19. Rule 27 is clear that engineers are not responsible for, or under any duty connected with his engine after he is relieved from duty.' I charge you that.

"'20. Under Rule 23, an engineer has no duty to perform in connection with his engine before thirty minutes in advance of the leaving time of the train for which he is called.' I charge you that."

This charge became the law of the case and, being unexcepted to by plaintiff, settles beyond all peradventure that intestate was not employed when he went into the roundhouse after he had been relieved from duty by signing off at 10:30 p. m., and before he had even been called to go out on train No. 59 at 6:10 the next morning, and certainly more than one-half hour before that time. *Dent vs. Boyce*, 16 S. C., 1; *Tourles vs. Ry.*, 83 S. C., 504. And the evidence discussed heretofore shows beyond question that intestate was not in the line of his employment when he went into the roundhouse. His action was not justified by duty or custom.

SPECIFICATION THIRD.

The Supreme Court of South Carolina falls entirely into error in holding that the facts as found by it—entirely unjustified by the evidence as they are—justify the reasonable inference that intestate was discharging any duty of his employment when he went into the roundhouse.

The facts found by such Court (R., pp. 154-156) are that intestate was not required to inspect his engine, save a half hour before the scheduled leaving time of his train, when such engine had been brought out of the roundhouse and placed upon a track outside, in the yard. If intestate voluntarily undertook the inspection long before this time, in the dark, while such engine was in a dark and dangerous place, and without even availing himself of the torch given him to light his way when a light was proper, was he discharging a duty of his employment so as to call upon the master for a safe place to work? The master employs a man specifically to do a certain thing at a time certain and at a safe place. Does this employment cover the doing of the thing at a different time and in another unsafe place, by reason of which the alleged servant sustains injury? The answer is obvious. Elliott on Railroads, *supra; Patton vs. T. & P. R. Co.*, 179 U. S., 658, 45 L. Ed. 361; *Ellsworth vs. Metheney*, 104 Fed., 119, 44 C. C. A., 484; *Russell vs. Oregon Short Line*, 155 Fed., 22, 83 C. C. A., 618; *St. L. S. W. Ry. vs. Harvey*, 144 Fed., 806, 75 C. C. A., 536.

SPECIFICATIONS FOURTH AND FIFTH.

Suppose the roundhouse was incomplete, with no lights, and the pit open and unguarded. How can an employe whose duties do not carry him into the roundhouse be heard to complain because of these dangers? Can an employe demand that the master shall not have a dangerous place upon his premises when the employe is not required, in any wise, to come in contact with the danger? The question here is whether there was a duty to intestate incidental to the relation of master and servant. The ques-

tion of a license or invitation to intestate as a person, but not an employe, and any corresponding duty to intestate, is not in this case, because the Act imposes a duty only when the relation of master and servant exists.

The majority opinion disregards the two essential ingredients of actionable negligence. It awards damages when no legal duty existed on defendant, in favor of intestate, to have the roundhouse safe and when, even if it did, the violation thereof did not legally cause his death.

The fact that hostlers and machinists may have been required to go into the roundhouse would not impose on defendant a legal duty to use due care to have the roundhouse safe for another class of employes whose duties did not take them into the roundhouse and whose presence there defendant could not reasonably, and was not required legally, to anticipate. Probably the hostlers and machinists had been warned of the danger of going into the dark roundhouse without a light and furnished lights to avoid the dangers, if such warning could be necessary when the danger was so obvious.

There is no liability under this Act except in cases of negligence—the master is no insurer of his servant's safety. *Seaboard Air Line Ry. vs. Horton, supra.* There can be no negligence in the absence of a duty to take care, owed to the very person injured and in respect of the very matter or act charged as negligence. *Stone vs. Railroad Co.*, 96 S. C., 228, 238. Since the company could not anticipate intestate's presence in the roundhouse it was under no duty to make it safe for him.

It is needless to add that an abstract failure of defendant to have the roundhouse safe would not be actionable unless the proximate cause of intestate's death, and this inference can not be made from the evidence, since intestate's entrance into the roundhouse and fall into the pit could not be considered a "result naturally and reasonably to be expected therefrom." "It was not the natural and probable consequence and could not have been foreseen in the light of the circumstances attending the negligence of

the officers in charge of the" roundhouse. *Scheffer vs. Washington City, etc., Rd. Co.,* (15 Otto), 105 U. S., 449, 26 L. Ed., 1070; *Murphy vs. Rd. Co.,* 89 S. C., 15 at 23.

The denial of negligence and proximate causation put in issue whether intestate's death was caused entirely by his own negligence or careful act, under the South Carolina practice. *Kennedy vs. Ry.,* 59 S. C., 535. The only inference is that intestate's own voluntary act, in going into the dark roundhouse without even using the torch with which he was provided (R., p. 53), the dangers thereof being obvious, was the entire proximate cause of his own death. *Ellis' Admr. vs. L. H. St. L. Ry. Co.,* 160 S. W., 512.

SPECIFICATION SIXTH.

The rule for the determination of the question of assumption of risks under the Federal Act is distinctly stated by this Court in *Seaboard Air Line Ry. vs. Horton, supra,* as follows:

> "And a workman of mature years is taken to assume risks of this sort, whether he is actually aware of them or not. But risks of another sort, not naturally incident to the occupation, may arise out of the failure of the employer to exercise due care with respect to providing a safe place of work and suitable and safe appliances for the work. These the employee is not treated as assuming until he becomes aware of the defect or disrepair and of the risk arising from it, unless defect and risk alike are so obvious that an ordinarily prudent person under the circumstances would have observed and appreciated them. These distinctions have been recognized and applied in numerous decisions of this court." . . .
>
> "When the employee does know of the defect, and appreciates the risk that is attributable to it, then if he continues in the employment, without objection, or without obtaining from the employer or his representative an assurance that the defect will be remedied, the employee assumes the risk, even though it arises out of the master's breach of duty. If, however, there be a promise of reparation, then during such time as

> may be reasonably required for its performance or until the particular time specified for its performance, the employee relying upon the promise does not assume the risk unless at least the danger be so imminent that no ordinarily prudent man under the circumstances would rely upon such promise."

Under the facts in this case, it is necessary for the Court to pass the first two points and find that there was sufficient evidence that intestate was employed in interstate commerce, and of negligence on the part of the defendant under the allegations of the complaint, before it comes to the consideration of this question, but assuming that the Court will reach the point, we submit that the undisputed facts admit of no other inference but that intestate assumed the risks.

Assuming that it was negligence to have the roundhouse unlighted and the pit open and unprotected, the chief danger was due to the darkness, which made the pit dangerous. The darkness was necessarily an obvious defect and danger, and intestate must have been aware of this defect and of the risk arising from it, at least, such defect and risk were so obvious that an ordinarily prudent person under the circumstances would have observed and appreciated them. Intestate was a workman of mature years, with many years of experience as a railroad engineer. He had been running into the Cayce yards for several months during the construction of the roundhouse and had made three trips in and out since the roundhouse had been in use. He had been into the roundhouse earlier on the very night in question. From such experience, intestate must have known and will be presumed to have known, under the rule stated, that roundhouses in general and this roundhouse in particular, contained tracks, engines, cars and pits, making it dangerous for one to walk therein in the darkness. So, clearly the case comes within the rule, that all of the defects and dangers were so obvious that an ordinarily prudent person, under the circumstances, would have observed and appreciated them. In the face of this

situation, intestate went in without using the torch given him to light his way. There is not the slightest suggestion but that intestate acted entirely voluntarily and under no immediate orders from any representative of the defendant; much less was there any suggestion that there was any complaint or objection on his part or any promise by the defendant to remedy the defects. It is submitted that these undisputed facts make a clear case of assumption of risks, within the rule quoted, and defendant was entitled to the direction of a verdict upon this ground.

SPECIFICATION SEVENTH.

It needs no comment to point out that the charge as to assumption of risks in plaintiff's requests numbered 6 and 11 was substantially erroneous under the Horton case. In fact, the charges in the two cases cannot be distinguished. In the sixth request, the jury was specifically instructed that "The servant does not assume the risks or hazards incident to the negligence of any of the officers, agents or employees of any such common carrier." In the eleventh request, the jury was instructed "He (the servant) does not assume the risks arising from the negligence of the master." They were then further instructed that the master was under a reasonable duty to furnish a safe place to work and that if he failed to do so, he was liable, thus again excluding the proposition that the servant might assume the risks incident to the defects in the place to work, although they were caused by the negligence of the master.

The jury were then properly instructed, later on in the case, by defendant's request numbered 8½, according to the true rule of the Horton case. The majority opinion says that although these instructions were inconsistent it could not have been prejudicial because "There was no word of testimony to show that Mr. Padgett knew or ought to have known of the open pit." (R. p. 156). Certainly there was testimony that Padgett had been in the roundhouse before that night, that he had been running into

Cayce for several months during the construction of the roundhouse and had made three trips in and out since it was completed. If the evidence reasonably admitted of the conjecture and speculation that when Padgett came to his death, he was going into the roundhouse to perform a well recognized duty, would it be any more conjectural or speculative for the jury to have found that on these numerous other occasions he had been into the roundhouse to perform some other duty? It seems to the writer that the jury should be allowed to speculate as well in favor of defendant as against it. But aside from this, it is not necessary that the servant know of the particular risk and it was not the open pit alone that was dangerous to Padgett, but it was the open pit combined with the darkness. The substantial evidence certainly entitled the jury to find that Padgett knew of the darkness and knew there were open pits and other dangerous things in the roundhouse, and voluntarily undertook to go into the same, without objection or complaint or promise of repair, and consequently assumed the risks.

We submit that the Court was in error in holding that defendant was not prejudiced by these inconsistent instructions, but that on the contrary, it was deprived of a substantial right under the Federal Act to have the jury consider the defense of assumption of risk, properly raised by the answer, and to sustain which there was certainly substantial testimony. Assuming that the jury was intelligent and conscientious and paid some attention to the charge, they could have reached an intelligent and conscientious verdict on this point by following the plaintiff's requests numbered 6 and 11, and excluding any consideration of the defense of assumption of risks, because they had previously found that the roundhouse was defective, due to the negligence of defendant.

CONCLUSION.

The cause of Padgett's death is purely speculative and conjectural. The only reasonable conjecture is that he

went into the roundhouse to go to sleep on his engine, but there are numerous other conjectures that may be made as to how Padgett fell into the pit and the real purpose for which he went into the roundhouse. Any one of these is equally as reasonable as the conjecture upon which the judgment was awarded, to wit, that he went in to inspect his engine.

We respectfully submit that the language of this Court in *Patton vs. Railway, supra,* is pertinent.

> "Second. That in the latter case it is not sufficient for the employee to show that the employer may have been guilty of negligence; the evidence must point to the fact that he was. And where the testimony leaves the matter uncertain and shows any one of half a dozen things may have brought about the injury, for some of which the employer is responsible and for some of which he is not, it is not for the jury to guess between these half a dozen causes and find that negligence of the employer was the real cause, when there is no satisfactory foundation in the testimony for that conclusion. If the employee is unable to adduce sufficient evidence to show negligence on the part of the employer, it is only one of the many cases in which the plaintiff fails in his testimony; and no mere sympathy for the unfortunate victim of an accident justifies any departure from settled rules of proof resting upon all plaintiffs."

It is also well said by the Court in *Greene vs. Railway,* 72 S. C., 398, as follows:

> "The cause of the accident is purely conjectural There is no more reason to suppose it was due to a defect in the machine than to an unconscious error of the plaintiff in its operation, or to some other undiscoverable cause for which neither party was responsible. 'A servant cannot recover where it is merely a matter of conjecture, surmise, speculation, or supposition, whether the injury was or was not due to the negligence of the master.'"